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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JOSEPH GERMANO, ET AL., *Appellants*,

v.

OTTO KERNER, ET AL., *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

This is an appeal by Joseph Germano, et al., from a judgment entered on July 29, 1963. The Judgment was entered in accordance with an Opinion of the District Court of the United States for the Northern District of Illinois, as a three-judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C. § 2281. This Statement is submitted by Appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

Opinions Below

The majority Opinion of the District Court of the United States for the Northern District of Illinois denying Appellants relief is reported at 220 F. Supp. 230 (N.D. Ill.,

1963) and is attached to this Jurisdictional Statement, along with the concurring Opinion of Circuit Judge Schnackenberg, as Appendix A, *infra*, at page 19. The dissenting Opinion of District Judge Austin is attached to this Statement as Appendix B, *infra*, at page 34.

Jurisdiction

This suit was instituted by Appellants under 42 U.S.C. §§ 1983 and 1988 (17 Stat. 13 and 16 Stat. 144, as amended); and 28 U.S.C. § 1343(3) (62 Stat. 932); and 28 U.S.C. § 2281, et seq., (62 Stat. 968); and 28 U.S.C. §§ 2201 and 2202 (62 Stat. 964, as amended, 72 Stat. 349) seeking a declaratory judgment and injunctive relief restraining the enforcement, operation and execution of Article IV, Section 6, as amended, of the Constitution of Illinois and the implementing statutes thereto, Ill. Rev. Stat. Ch. 46 §§ 158-2-158-5 (1962 Supp.). Under such Illinois Constitutional provisions and statutes, Appellants are denied full and equal voting rights in the election of members of the State Senate. Such denial violates the Fourteenth Amendment to the Constitution of the United States.

Notice of Appeal was filed on September 24, 1963. The jurisdiction of the Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Baker* v. *Carr*, 369 U.S. 186; *Maryland Committee For Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d. 656 (1962), 229 Md. 406, 184 A. 2d. 715, Docket No. 29, *prob. juris.* 374 U.S. 804; *Davis* v. *Mann*, 213 F. Supp. 577 (E.D. Va. 1962), Docket No. 69, *prob. juris.* 374 U.S. 803; *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *sub noms.*, *Reynolds* v. *Sims*, *Vann* v. *Frink*, *McConnell* v. *Frink*, Docket Nos. 23, 27, 41, *prob. juris.* 374 U.S. 802; *WMCA, Inc.* v. *Simon*, 208 F. Supp.

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Statutes Involved and Constitutional Provisions

Article IV, Section 6, as amended, of the Constitution of Illinois, and the implementing statutes, Ill. Rev. Stat. Ch. 46 §§ 158-2-158-5 (1962 Supp.), which are set forth in Appendix C, *infra*, at page 43. 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 1343 (3), which are set forth in Appendix D, *infra*, at page 61. The United States Constitution, Amendment XIV, Section 1, which is set forth in Appendix E, *infra*, at page 63.

Question Presented

Where provision is made for reapportionment of the Illinois House of Representatives decennially according to population, whether the Fourteenth Amendment's equal protection clause is violated by the provisions of the Illinois Constitution and implementing statutes which arbitrarily divide the State into three segments and arbitrarily district each of these segments into a fixed number of senatorial districts thereby permanently enabling less than twenty-nine per cent of the State's population, residing principally in rural areas, to elect a majority of members of the Senate?

Statement of the Case

Appellants brought this action against election officials of the State of Illinois to invalidate Article IV, Section 6, as amended, of the Constitution of Illinois and the cited implementing statutes which, as stated by Judge Campbell

in the majority opinion below, create a plan of Senate apportionment that "discriminates against certain voters, particularly against those such as themselves [the Appellants] who live in Metropolitan as opposed to rural areas."[1] The effect of these apportionment provisions is that less than twenty-nine per cent of the State's voters residing largely in fixed rural or "downstate" areas are granted the perpetual power to elect a majority of the members of the State Senate. This action conferring perpetual control of the Senate upon a predominantly rural minority was rationalized in part on the ground that the State's House of Representatives is apportioned on a population basis. Appellants contend that this plan, as well as the means chosen to effectuate the plan, violates the equal protection of the law clause of the Fourteenth Amendment to the United States Constitution.

Appellants further sought to restrain the Appellees from taking any action pursuant to the Constitution of Illinois and the implementing statutes with respect to primary, general or special elections for the office of Senator to the General Assembly of Illinois until the relief prayed for herein was granted. In addition, Appellants requested that the Court retain jurisdiction over this cause until such time as the Senate of the State of Illinois had been reapportioned to insure the voters of the State the equal rights guaranteed them by the Constitution of the United States.

The facts are undisputed and the case was decided on the pleadings. A majority of the three-judge District Court rejected all of Appellants' contentions, holding that the Illinois Senate is not irrationally apportioned or districted. The Court claimed support for its opinion in the "Federal analogy" and in the fact that the representation

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[1] 220 F. Supp. at 232.

plan of Illinois had been approved by a referendum of the people of Illinois. Judge Austin in a carefully written dissent rejected the reasoning of the majority.

Article IV, Section 6,[2] of the Illinois Constitution was amended by the voters of Illinois, by referendum, in 1954.[3] Essentially, this amendment divided the State into three segments: (a) Chicago, (b) the portion of Cook County outside of Chicago and (c) the remainder of the State. The amendment further provided for fifty-eight senatorial districts which were allocated among these three segments of the State as follows:

Chicago	18 districts
Cook County outside Chicago	6 districts
Remainder of State	34 districts

Finally, the amendment required the Illinois General Assembly in 1955 to redistrict each of the three segments of the State into the prescribed number of Senate districts, providing that in the formation of the districts "area shall be the prime consideration."

This 1955 statutory plan of districting, currently in effect, is set forth in Appendix C, *infra*, at page 43. Maps, geographically reflecting the 1955 enactment, are attached to this Statement as Appendices F, G and H, *infra*, at pages 64 to 66. Appendix F shows the eighteen (18) Senate districts of Chicago; Appendix G shows the six (6) Senate districts of Cook County outside of Chicago and Appendix H shows the remaining thirty-four (34) Senate districts outside of Cook County. Attached as Appendix I, *infra*, at page 67, is a list of the senatorial districts,

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[2] Appendix C, *infra*, at page 43.

[3] Amendment proposed by Laws 1953, page 1924, S.J.R. No. 32; adopted general election November 2, 1954; proclaimed adopted November 19, 1954.

currently existing, showing their populations based upon 1950 and 1960 Federal census figures. Appendix J, *infra*, at page 69, is a table listing the fifty-eight (58) senatorial districts in order of decreasing population and also showing the areas of each in square miles. Appendix K, *infra*, at page 70, is a table which demonstrates the debasement of Appellants' voting franchise. This table depicts the value of a vote cast by each of the Appellants in his respective senatorial district as compared with the value of one vote (a) in an ideal or average district (arrived at by dividing the total population of Illinois, 10,081,133, by 58, the number of senatorial districts) and (b) in the 32nd senatorial district. The charts and tables attached hereto clearly reveal that the existing apportionment of the Illinois Senate results in a serious dilution and debasement of Appellants' voting rights.

The apportionment scheme follows no rational policy. Judge Campbell in the majority opinion below characterized the Illinois senatorial apportionment plan as follows:

> "The 1955 Act created 58 senatorial districts on an arbitrary, clearly political compromise motivated, area basis. The result is obvious, the one voter-one vote ratio is neither sought or desired and of course is not attained. The figures, graphs and statistics set forth in Plaintiffs' complaint correctly and unequivocally depict a clear picture of population disparities in State senatorial districts."[4]

A rural minority constituting substantially less than one-third of the State's population is given permanent veto power over the will of the majority in the legislature. Article IV, Section 6, as amended, and the implementing statutes result in flagrant discrepancies in population fig-

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[4] 220 F. Supp. at 232.

ures and voting power between and among senatorial districts in (1) the State as a whole, (2) inside the City of Chicago itself, (3) in Cook County outside of Chicago, and (4) in areas outside of Cook County. As the Appendices to this Statement show, the first senatorial district, located in Cook County, is 10.6 times more populous than the thirty-second district, located in "downstate" Illinois. Yet each district is entitled to send one Senator to the Illinois Senate. Within the most populous district in Chicago (District 27) there are 5.3 times more people than in the least populated Chicago district (District 9). A similar irrational "crazy-quilt" pattern is evident even in the "downstate" senatorial districts.

The legislative history of Illinois, as it relates to representation in the Illinois Senate and House, indicates that a system of representation based upon population in both Houses was desired. This fact is borne out by the Northwest Ordinance of 1787,[5] the Illinois Enabling Act of 1818,[6] the Illinois Constitution of 1818,[7] the Illinois Constitution of 1848,[8] and the Illinois Constitution of 1870, currently

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[5] Northwest Ordinance of 1787, Rev. Stat. 2d Ed., p. 13, Art II (1878), provides in part that: "The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature. . . ."

[6] The Illinois Enabling Act of 1818, 3 Stat. Ch. LXVII, p. 428 (1818), authorizes Illinois to form a government and seek admission to the Union and provides in part: "*Provided*, That the [Constitution and State government], whenever formed, shall be republican, and not repugnant to the [Northwest] ordinance. . . ."

[7] The Preamble to the Illinois Constitution of 1818, Illinois' first Constitution, incorporated the foregoing provisions of the Northwest Ordinance of 1787 and the Enabling Act of 1818. In addition, the Constitution of 1818 further implemented this language of the Preamble by providing in Article VIII, Section 5, as follows: "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . . § 5. That elections shall be free and equal." See also footnote 9.

[8] The same language which appeared in Article VIII, Section 5, of the Illinois Constitution of 1818 was carried over in the Illinois Constitution of 1848, Article XIII, Section 5, but with the addition of the word "all"

in effect. In fact, Article II, Section 18 of the present Constitution states that "all elections shall be free and equal."

As originally drawn, Article IV, Section 6 of the Illinois Constitution of 1870 required the Illinois General Assembly to reapportion the Senate every ten years,[9] but the Legislature prior to 1955 had failed to reapportion or redistrict the Senate for fifty-four years. As a result, by 1950 Cook County, accounting for more than fifty per cent of the State's population, was represented by only nineteen Senators in a legislative body which consisted of fifty-one Senators. Approximately fifty-two per cent of the people thus elected approximately thirty-seven per cent of the Senators. It was in this context that the 1954 amendment to Article IV, Section 6 was adopted.

No provision was made in the 1954 Amendment for any reapportionment or redistricting subsequent to 1955.[10] Nor does the Illinois Constitution provide for popular initiative procedures for amending the Constitution. The Illinois Constitution can be amended only after the General Assembly has by a two-thirds vote of all members of both houses proposed an amendment (Article XIV). This means that Senators representing less than sixteen per cent of the State's citizens can block any effort to change the present apportionment plan.

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before the word "elections," thus providing: "That all elections shall be free and equal." See also footnote 9.

[9] Both the Illinois Constitution of 1818, (Article II, Section 5) and the Constitution of 1848 (Article III, Section 8), as well as the present Constitution of 1870 (Article IV, Section 6), had required that Senate districts be equal or substantially equal in population and, in order to maintain such equality, provided for regular decennial reapportionment of senate districts in accordance with Federal census figures.

[10] As stated by Judge Campbell in the majority opinion below, "unlike the lower house no reapportionment or redistricting is provided for." 220 F. Supp. at 232.

The Federal Question Raised on This Appeal Is Substantial

Denial of equal voting rights is a flagrant violation of the mandate of the Fourteenth Amendment. The substantiality of the instant Appeal is also enhanced by the fact that it is one of first impression. This Court has never decided whether both houses of a state legislature must be apportioned on the basis of equality of voters. No case is now before this Court, nor has this Court been called upon to decide a case in which an "area" standard has been specifically prescribed, if only for the limited purpose of forming districts within the three specified segments of the State. No standard whatever is discernable in the division of the State into the three arbitrary segments or in the random allocation of Senate districts to these three segments. However, these unique provisions are shockingly clear as to their impact. The manifest result is to vest forever in a minority group an absolute veto power over the State's legislative processes. The Appellees admitted, and the majority judges found, such an intent and effect.

While no case is exactly like this one, there is a conflict among the lower courts as to the application of the basic constitutional principles to the question here presented. The majority of the lower courts which have discussed the application of these principles have disagreed with the rationale of the majority opinions in this case, subscribing rather to the dissenting opinion of Judge Austin. They have held that apportionment substantially based upon population is required in both houses of a state legislature. *Moss* v. *Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962), *sub noms., Price* v. *Moss, Oklahoma Farm Bureau* v. *Moss*, Docket Nos. 688, 689, *appeal dismissed*, 31 LW 3405 (June 11, 1963). By dismissing the appeal in the *Moss* case, this Court left standing the lower court's decision that the exist-

ing apportionment of both the upper and lower Houses of the Oklahoma Legislature is grossly and egregiously disproportionate and invidiously discriminates against the voters of the more populous counties, in violation of the Fourteenth Amendment. The lower court ordered that the Oklahoma Legislature must be reapportioned on the general principle of substantial numerical equality, giving each voter the same power and influence in electing members of both Houses. See also *Sims* v. *Frink, supra; Baker* v. *Carr*, 206 F. Supp. 347 (M.D. Tenn. 1962); *Davis* v. *Mann, supra; Thigpen* v. *Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962), *pending on appeal*, Docket No. 381; *Scholle* v. *Hare*, 367 Mich. 176, 116 N.W. 2d 350 (1962), *pending on appeal, sub. nom. Beadle* v. *Scholle*, Docket No. 24; *Davis* v. *Synhorst*, 217 F. Supp. 492 (S.D. Io. 1963). Cf., *Maryland Committee For Fair Representation* v. *Tawes, supra; WMCA, Inc.* v. *Simon, supra;* and *Nolan* v. *Rhodes*, 31 L.W. 2641 (S.D. Ohio, June 12, 1963).

This Court has held many times that statutes which require or sanction discrimination based upon race, religion or national origin violate the Fourteenth Amendment. Thus, it has been held that state legislative activity which restricts for such reasons the right of local citizens to vote for their municipal representatives is invalid. *Gomillion* v. *Lightfoot*, 364 U.S. 339. In *Gray* v. *Sanders*, 372 U.S. 368, 375, 379, this Court recently held that a voter has the right to an equal vote in statewide elections free of unfair impairment or invidious discrimination and that such right may not be infringed merely because a voter lives in one portion of the state rather than another. In like manner the Illinois provisions here questioned, which arbitrarily deny to certain voters equal representation in their State Legislature, must also fall as failing to meet the requirement of equality of the Fourteenth Amendment. A person qualified to vote who happens to reside in the City of Chicago, or in

any of the other areas in Illinois in which invidious discrimination exists, is discriminated against on that basis alone and the value of his vote is seriously vitiated. And, as is made clear in the next sections of this statement, there is no valid justification for such debasement of voting rights. As was stated by Mr. Justice Clark in *Baker* v. *Carr*, *supra*, at page 258:

> "If present representation has a policy at all, it is to maintain the *status quo* of invidious discrimination at any cost."

Justice Clark's statement is bluntly applicable to the present manner of representation in the Illinois Senate. It is obvious that this invidious discrimination will continue to exist until and unless this Court strikes it down. There is no other remedy.

As this Court knows, *Baker* v. *Carr*, 369 U.S. 186, triggered litigation, constitutional revision, and legislation in nearly every state. The major question now raised is how "equal" must voters or votes of voters be to satisfy the Fourteenth Amendment's equality requirements. This case represents another attempt of the rural minority to avoid giving up their control of state legislatures. Appellants contend that if this minority can maintain a veto over state legislation by control of one House, the Fourteenth Amendment will have been rendered worthless and *Baker* v. *Carr* will have been meaningless. Minority process is not due process or equal protection of the laws. Appellants also contend that if this Court upholds any slight degree of vote dilution as not violative of the Fourteenth Amendment, this Court, and other Courts, will be flooded constantly with cases raising ever differing degrees of equality. The only solution is a clear holding by this Court that "one-man-one-vote" means "one-man-one-full-vote." Such a holding is the only way to settle forever the uncertainty created as rural inter-

ests attempt to retain their ill-gotten and long-maintained control of state legislatures. It is such a decision that Appellants seek when they lodge their appeal here.

The questions herein as thus described are new, important and nationwide in consequence. Appellants are at the end of the road. Either this Court grants relief or the rural minority will forever exercise a veto in the Illinois legislature. In the absence of popular initiative procedures, the malapportioned Illinois General Assembly has complete control of the amending process in Illinois. It is unreasonable to suppose that Illinois Senators elected by and representing the beneficiaries of the malapportionment will relinquish their dominant position, especially when it requires only twenty Senators representing less than sixteen per cent of Illinois' population to defeat an amendatory proposal. Appellants, therefore, require a determination by this Court. An early determination is needed due to the Illinois primary election which takes place in April, 1964.

I

Apportionment and Redistricting of the Illinois Senate According to a Plan Which Permits Less That Twenty-nine Per Cent of the State's Population to Elect a Majority of the Senate Is Irrational in Fact and Violative of the Fourteenth Amendment to the United States Constitution.

The District Court was clearly in error in upholding the apportionment and districting of the Illinois Senate as rational in fact. Neither the fact that the Senate apportionment amendment was the subject of a referendum nor the so-called "federal analogy" provide any justification for denying equality of representation and equal voting rights to the Appellants and those similarly situated. Judge

Austin's dissenting opinion is an able exposition of the facts, law and logic which should be applied in this case.

A. *The Illinois Plan Is Irrational*

That the conferring of perpetual control of the Illinois Senate upon a selected twenty-nine per cent of the State's population is irrational seems so clear as not to require extensive argument. Since this fact of minority control is admitted, no argument is required to make its effect clear. To insure the perpetuity of this irrational apportionment and redistricting scheme there is no provision for changing it. There is no constitutional or statutory requirement that the General Assembly shall ever consider future population shifts as a factor in representation in the Senate. This fact alone is at odds with the equal protection clause of the Fourteenth Amendment in the circumstances of this case. The role of the Fourteenth Amendment in the context of representation in state legislatures has been well stated as follows:

> "The Fourteenth Amendment is concerned with one thing, and one thing only—that each person be treated equally in the eyes of the law of each and every State. In applying the requirement that each person be treated equally in the eyes of State law to the question of apportionment of seats in the State legislature, only one interpretation is possible. That interpretation requires that each man's vote must count the same as every other man's vote. The State has no authority to classify people according to where they live—urban or rural areas—the type of work they do —laborer or banker—the type of education they have had—high school or college graduate—and authorize such classes to elect representatives to the State Legislature in such a manner as to permit the vote of the

members of any such class to have more weight in the election of State legislators than the members of any other class. Therefore, the Commission believes that population is the only fair and acceptable method of apportioning seats in the State Legislature.

"Except to the extent that they are represented according to their numbers and that they have an opportunity to present their views to that body, minorities are not entitled to protection in the State legislature. Protection of minority interests or views does not mean the minority should be in a position to veto the desires of the majority. The protection given minority views and interests should not be a veto power in the legislative process, since other adequate protections are offered by both Federal and State constitutions. If minority interests are permitted to control the legislative branch of State government so as to defeat the wishes of the majority, the nation is faced with one of three alternatives: (1) the eclipse of State government because the people will turn to a more broadly responsive National Government to obtain their needs; (2) the perpetuation of tyranny of a minority over the affairs of State Government; or (3) the resort to precipitous or illegal means by the majority of the people whose desires have been frustrated." [11]

As previously set forth in this Statement, and as clearly revealed by the charts and tables attached hereto, the present apportionment of the Illinois Senate by senatorial districts is so irrational as to constitute invidious discrimination against Appellants and those similarly situated.

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[11] *Apportionment of State Legislatures*, Report of the Advisory Committee on Intergovernmental Relations, pp. 68-71, U.S. Government Printing Office (December 1962).

B. *A State Referendum May Not Nullify The Requirements of The Fourteenth Amendment*

The Court below rested its decision, in part, on the fact that the voters of Illinois endorsed the existing manner of representation in the Senate by referendum. However, this attempted justification fails completely when the context in which the voters approved the amendment is scrutinized. The amendment to Article IV, Section 6, increased slightly the voting strength and representation in the Senate of some, but not all, Illinois citizens who were severely underrepresented. Thus, for example, Cook County residents who comprise a majority of the State's population now elect 24 out of 58 Senators whereas they formerly elected 19 out of 51. Until this Constitutional Amendment of 1954 there had been no reapportionment in Illinois since 1901, and the manner of representation was utterly chaotic. In the 1954 referendum the voters were *not* given the choice of voting either upon a system of representation based upon population or upon the present plan of representation. The voters were offered only the Amendment here in question which vested perpetual control of the Senate in a predominantly rural minority. Therefore, it cannot be validly argued that the voters expressed themselves regarding a plan of representation based upon population. They were offered no such choice. It is only common sense that the voters who were being discriminated against would approve any proposal which would even minutely increase their voting rights. As Judge Austin said, "Although constitutionally entitled to a whole loaf, they [urban majority] accepted a crumb."[12] Even in situations where voters have been afforded a clear choice between reapportionment plans based upon population and other systems, courts have held that rejection of a popu-

[12] 220 F. Supp. at 239.

lation-oriented plan is not germane in seeking a determination of whether invidious discrimination exists in violation of the Fourteenth Amendment. *Thigpen* v. *Meyers, supra; Scholle* v. *Hare, supra.* In the *Thigpen* case the Court stated at page 832:

> "We are asked to decline jurisdiction because the voters of Washington in the general election . . . defeated an initiative measure designed to reapportion the Washington legislature according to population. . . . Our answer is concise and direct. We have no way of knowing whether the measure was defeated because a majority did not desire reapportionment or whether they didn't approve of the proposed method or whether they didn't understand it, . . . or whether the opponents were better organized than the proponents. It makes no difference. *The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority.*" [Emphasis Supplied]

Again in *Moss* v. *Burkhart, supra,* at page 894, the Court stated that the rights claimed by the plaintiffs there could not "be made to depend upon the will of the majority."

C. *The "Federal Analogy" Is Inapplicable*

The Court below further sought to base its decision upon the ground that the apportionment of the Illinois General Assembly is analogous to that employed in the United States House of Representatives and Senate. This is a misleading and false analogy. The underlying rationale upon which representation in the United States Congress is based is that the United States is a federation of independent sovereignties. The presently existing manner of representation provided for under the Federal principle was demanded by certain of these independent sovereignties before they would agree to relinquish a portion of their

sovereignty to establish a central government. On the other hand, a state is not truly a federation of counties and political subdivisions in the sense that the latter preceded the former. To the contrary, the state is the creator and the local governmental units are the created. Moreover, representation in the Illinois Senate is based upon an artificial division of the State into three segments, in each of which segments a specified number of Senate districts are to be formed on the basis of "area" considerations. These senatorial districts have no independent significance, such as counties or other political subdivisions. Certainly, "senatorial districts" are not sovereign or quasi-sovereign entities.

This so-called Federal analogy has been rejected in other cases. *Davis* v. *Mann, supra; Sincock* v. *Duffy*, 215 F. Supp. 169 (Del. 1963), *sub nom., Roman* v. *Sincock*, Docket No. 307, *prob. juris.* 32 L.W. 3149 (Oct. 21, 1963); *Sims* v. *Frink, supra; Scholle* v. *Hare, supra.*

As previously shown, the legislative history of the State of Illinois makes manifest that representation in both Houses of the General Assembly was to be based upon population. This legislative history differs completely from the history leading up to the adoption of the United States Constitution, as that Document relates to representation in the Federal House and Senate.

The District Court questioned the need of retaining a bicameral legislature if both Houses of the Illinois General Assembly are apportioned according to population. In answer to this inquiry it has been recently stated:

> "Nor is it true that two houses based on population will be mirror images of each other. They will, rather, present different reflections or combinations of the various elements that make up the population. For one thing, one house will have more members than the other representing smaller districts. The length

of terms will differ. In addition, members of one house may be elected from single-member districts, while multi-member constituencies are used in the other house. And, not least, politicians are human beings whose differing personalities produce institutions of differing qualities.

"A number of states offer contemporary evidence that two houses based on population are by no means duplicates of one another. In Massachusetts both houses are apportioned on the basis of population; the two houses are among the most representative in the country. But the House has 240 members, the Senate 40, and even under control of the same party the two bodies manage to disagree often enough. In Washington and Oregon both houses are based on population; though less disparate in size than the Massachusetts chambers (there are about half as many senators as representatives), the two houses are quite different in political outlook." [13]

Conclusion

It is submitted that the court has jurisdiction, and it should hear this appeal and reverse the judgment denying Appellants the equal voting rights which they are guaranteed by the Fourteenth Amendment. The question here presented is new, substantial and important to our Nation's future. Respectfully submitted,

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[13] *One-Man-One-Vote*, Twentieth Century Fund, p. 11, (1962).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 63 C 291.

JOSEPH GERMANO, JOHN ALESIA, JOSEPH CESARIO, LEO KEEFER, RAYMOND SAROCCO, SAM E. PERISH, JOSEPH POCHERVINA and BUDDY W. DAVIS, *Plaintiffs*,

v.

OTTO KERNER, as Govenor of the State of Illinois and Chairman of the State Electoral Board; CHARLES F. CARPENTIER, as Secretary of the State of Illinois and Secretary of the State Electoral Board; WILLIAM G. CLARK, as Attorney General of the State of Illinois and member of the State Electoral Board; WILLIAM J. SCOTT, as Treasurer of the State of Illinois and member of the State Electoral Board, and MICHAEL J. HOWLETT, as Auditor of Public Accounts of the State of Illinois and member of the State Electoral Board of Illinois, *Defendants*,

and

CLYDE BEALS, DAVID DAVIS, JOSEPH R. MALLORY, WILLIAM MCKNIGHT, JR., CARL SCHWEINFURTH, HAROLD B. STEELE, MRS. FAYE STRIEBINGER, and THE ILLINOIS AGRICULTURAL ASSOCIATION, *Defendants-Intervenors*.

Before Circuit Judge Elmer J. Schnackenberg, Chief District Judge William J. Campell and District Judge Richard B. Austin.

Circuit Judge SCHNACKENBERG. It is my purpose to concur in the opinion which Judge Campell presents and to express some additional views on the subject of this case.

Based on the facts set forth in the complaint, plaintiffs attack the 1954 amendment to article IV of the constitution of Illinois, which provides for the apportionment of the state senate districts on other than a population stand-

ard, as distinguished from the house of representatives, which continues to be chosen on a population basis.

According to the 1960 federal census, 5,129,725 people—somewhat more than half the 10,081,158 total population of the state—reside in the great metropolitan area of Cook County. The remaining 4,951,433 people of Illinois are spread over the 101 "downstate" counties (*i.e.*, those other than Cook).

Prior to the adoption of the 1954 amendment, the last preceding reapportionment of the legislative districts of the state of Illinois, from which representatives as well as senators were elected, took place in 1901. Although the Illinois constitution of 1870, which was in effect during all of the intervening time, required the general assembly following each decennial federal census to reapportion the state according to population, that duty was not performed. The result was that, while Cook county, containing Chicago and its suburbs, grew in population which finally exceeded that of the rest of the state, it remainded underrepresented in both houses of the legislature.

Cook county, with its highly concentrated population, had social, economic and political interests different from those of the sparsely populated downstate areas. These interests inevitably at times conflicted in the legislative process. The long existing numerical dominance of the downstate area in both houses of the legislature and the inexcusable failure to reapportion the legislative districts for nearly a half century resulted only in a stalemate in all efforts to resolve this injustice. This conflict in interests was brought to a direct issue on several occasions when efforts were made in the legislature itself in 1923, 1925 and 1929, to comply with the 1870 constitutional provisions.[1] On each of these occasions, a resolution was introduced in the house of representatives providing for the

[1] In this connection we take judicial notice of the house journals of the Illinois House of Representatives. House joint resolutions were introduced providing for the appointment of a joint committee to make an apportionment plan, in accordance with article IV, section 6 of the Illinois constitution of 1870. 1923 House Journal 51, 163; 1925 House Journal 44, 70, 71, 88; 1929 House Journal 166, 433, 477, 478.

appointment of a commission to prepare a reapportionment bill in accordance with the state constitution. Each such resolution on a roll call was defeated, the favorable votes coming almost entirely from Cook County and the adverse votes from downstate.

In a suit filed by a citizen for a writ of manadamus to compel the members of the general assembly to apportion the state in accordance with the aforesaid constitutional provision, *Fergus* v. *Marks*, 321 Ill. 510 (1926), the Illinois Supreme Court held that the judical department had no control over the matter, which had been solely confided by the constitution to the general assembly, and denied the relief, although it held in a similar suit, decided in 1929, *Fergus* v. *Kinney*, 333 Ill. 437, that the duty to reapportion imposed by the constitution is mandatory.

It is thus apparent that, long before 1954, this problem called for a compromise solution to the end that neither area would be dominant over the other. It was to attain this objective that the people of Illinois adopted the 1954 constitutional amendment and that, pursuant thereto, the state was redistricted in 1955, 30 of the 59 representative districts being placed in Cook county,[2] while, in the senate, downstate resident were granted a check upon the political power of the Cook county metropolitan area.[3]

In considering the 1954 amendment, the holding in *MacDougall* v. *Green*, 335 U. S. 281 (1948) is apposite, because there the court upheld an Illinois law, which, like the 1954 amendment, provided a check upon the political dominance of the most populous area of the state. At 283, the court said:

> "• • • To assume that political power is a function exclusively of numbers is to disregard the practi-

[2] Provision was made that the house shall be redistricted according to population each decade, following the census. In the event the general assembly fails to accomplish redistricting, the power and duty to do so devolves upon a special *ad hoc* commission (Art. IV, § 8).

[3] Both article IV, § 6 and article IV, § 7 also recognize a division within Cook county between the city of Chicago (1960 population 3,550,404) and the suburban communities. Of 30 representative districts allotted to Cook county in 1955, 23 were placed in Chicago. Of the 24 senatorial districts allotted to Cook county, 18 are in Chicago.

calities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. * * *"

MacDougall v. *Green* has not been overruled by *Gray* v. *Sanders*, 372 U. S. 368 (1963) where the court, at 376, actually disclaimed any intention of ruling on a question such as we have before us, which it states as "whether a State may have one house chosen without regard to population. * * *", and, at 378, made clear that it was in that case not concerned with the composition of the state legislature, and that *Gray* was "only a voting case".

On the other hand, *MacDougall* was cited with approval by Mr. Justice Brennan, for the court, in *Baker* v. *Carr*, 369 U. S. 186 (1962) at 203, 207, and by Mr. Justice Clark at 251 and Mr. Justice Stewart, at 265, who concurred.

It is apparent that the 1954 amendment now under attack reflects a rational policy fully consistent with the principles of the equal protection clause, to which the court referred in *Baker* v. *Carr*, *supra*, at 226:

"* * * Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

The apportionment plan now under attack reflects a definite, reasoned policy. It is neither arbitrary nor capricious.

Its policy has been recognized by the Illinois Supreme Court in *Donovan* v. *Holzman*, 8 Ill. 2d 87, 132 N. E. 2d 501 (1956), which, at 91, described the result as "a satisfactory compromise between Cook County and downstate Illinois".

That court, at 92, quoted from an official statutory explanation of the amendment given to the voters prior to election day:

> "This amendment follows the system which the founding fathers wrote into the national constitution and which has proved so successful in the case of Congress. There the House of Representatives is based on popular representation and the Senate is based on a form of area representation, similar in principle to what is proposed for Illinois."

An attempt is made to differentiate between the conditions which produced as a compromise the 1954 Illinois provision and the conditions which produced the compromise leading to the provision for election of members of the United States Senate in disregard of the population of their states. However, both the plan for the choice of United States senators regardless of population and the 1954 plan in Illinois were the results of compromises. The compromises in both cases were actual and necessary. If the representation of each state by two senators in the United States Senate is valid because based on a compromise, then the provision for election of state senators in Illinois based upon a compromise is likewise valid.

The judicial verity that supported the wisdom of our forefathers in establishing the United States Senate on a territorial basis as a compromise with the principle of representation based upon population is sound and is relevant to our consideration of the 1954 compromise in Illinois, which similarly settled its metropolitan versus downstate stalemate by creating a senate on a territorial basis. Moreover, Illinois has continued to adhere to the pattern of a republican form of government. The accomplishment of this objective complies with the guarantee

of the federal constitution that each state shall have a republican form of government.[4] Moreover, it is interesting to note that the Illinois compromise was chosen by the votes of the electors in Cook county as well as in the downstate areas.

At this point, it is well to remember that legislative authority, both national and state, is involved when new states are admitted to the federal union. While undoubtedly the drafting of a plan of apportionment is a state legislative function, it is the constitutional duty of congress, when admitting states to the union, to determine whether they have governments republican in form in compliance with the federal constitution. It is therefore significant, as pointed out by intervenors, that, when Hawaii and Alaska were recently admitted, Congress by resolutions approved and "found to be republican in form and in conformity with the Constitution of the United States" the constitutions of those states, although senatorial districts of widely variant populations were created. For example, in Hawaii, 500,409 persons were given 10 senators, while 132,363 were given 15 senators, according to the 1960 census.[5] The Hawaii constitution approved by Congress is printed as Appendix A to S. Rep. No. 80, 86th Cong., 1st Sess. (1959). In Alaska, one of the senatorial districts has a population of 5,705, while another has 87,748. The Alaska constitution approved by Congress is printed as Appendix A to H.R. Rep. No. 624, 85th Cong., 2d Sess. (1958).

For all of these reasons I concur in Judge Campbell's opinion.

July 29, 1963.

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[4] Art. IV, § 4, U. S. Const.

[5] All population figures in this paragraph have been furnished to us in the brief of intervenors. Their correctness has not been questioned by any counsel.

No. 63 C 291

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CAMPBELL, C. J.:—

In the lexicon of the legal profession this is another apportionment case. Plaintiffs have sought and appropriately been granted the present three-judge court. Title 28 § 2281 and § 2284.

The instant complaint, which for all practical purposes is a prototype of the complaint in *Baker* v. *Carr*, 369 U. S. 186, alleges that the plaintiffs, citizens, residents and qualified voters of the State of Illinois, have been denied equal protection and due process of the law by a 1954 Amendment to the Constitution of Illinois (Now Art. IV Section 6 of the Illinois Constitution) which authorized a certain 1955 Act of the Illinois General Assembly which, in turn, created the state's senatorial districts. More specifically, the complaint alleges that the method of electing state senators, which is set out in the above Act, is based primarily on a geographical basis—rather, than on what plaintiffs allege is the only proper basis—population. (The lower house of the Illinois bicameral legislature is elected, pursuant to the same Amendment and Act, primarily on a population basis.) The result, plaintiffs contend, is a grossly malapportioned state senate, an obvious debasement and diminution in the value of their vote and an invidious discrimination in violation of the Fourteenth Amendment of the Constitution of the United States.

Members of the Illinois Agricultural Association, by motion, sought and were granted leave to intervene in this action. They oppose the plaintiffs' complaint.

The plaintiffs' prayer for relief is best summarized by their brief which states their requests as follows:

(a) "That Article IV, Section 6 of the Constitution of Illinois and the implementing statutes . . . (be declared) void and invalid. . . ."

(b) That the defendants be restrained "from certify-

ing any candidates, proclaiming any election results, (etc.) . . . pursuant to Article IV, Section 6 of the Constitution of Illinois . . . or of the statutes in implementation thereof . . . for the office of senator to the General Assembly. . . ."

(c) That this Court "retain jurisdiction of this cause . . . until such time as the senate of the State of Illinois, freed from the fetters imposed by the Constitutional provisions invalidated by this Court has been reapportioned and redistricted to insure all voters . . . the rights guaranteed them by the Constitution of the United States."

(d) That this Court "grant such other and further relief as to this Court may seem just and proper."

Defendants have filed a motion to dismiss predicated upon two alternative grounds, 1) lack of jurisdiction and 2) failure to slate [sic] a claim upon which relief can be granted. Defendants also submitted an alternative motio' asking the court to 3) forbear or abstain from taking further action on the case based on the doctrine of "Abstention". These motions were briefed by the parties and oral argument was heard by the court. On the basis of *Baker* v. *Carr, W.M.C.A. Inc.* v. *Simon*, 370 U. S. 190 and *Scholle* v. *Hare*, 369 U. S. 429 defendants' motions were denied.

At the suggestion of the Court and with the consent of the parties it was agreed that the case could properly be tried on the merits based on the facts well pleaded in the plaintiffs' complaint. Defendants, in the language of the common law, are therefore by their consent filed herein demurring to the complaint. In accordance with the Federal Rules of Civil Procedure we consider this as a motion for judgment on the pleadings in accordance with Rule 12 (c), Title 28.

Generally the complaint, the only pleading before us, in addition to reviewing historical background outlines the present Illinois pattern for senate apportionment and includes a breakdown of the senate districts as to population and square mile area coverage.

Considering the complaint on its merits, necessarily,

all of the facts well pleaded therein are accepted—however, the many conclusions of law also enwoven within the complaint are of course not accepted, but on the contrary, form the crux of the issues presently before the Court.

The facts show a clear picture of a bicameral legislature, similar in structure, if not necessarily in form or election method, to that of the federal government, the English Parliament and all of our individual sister states except Nebraska, which uniquely functions under a unicameral legislative body. Similarity continues with most of the above bicameral legislatures in that Illinois provides for the election of the members of one house, in this case the lower house, on the basis of population. What is here sought and intended is a realization of a one voter-one vote ratio. (In Illinois each voter votes for three members of the lower house.) Decennial reapportionment is provided to take into account possible shifts in the state's population. Plaintiffs do not raise issue with this plan, for that matter they contend that this plan or method of electing legislators is the only constitutionally acceptable one, and that any deviation therefrom by the use of weighted voting systems results in an invidious discrimination and violation of the Constitution.

The upper house or senate, on the other hand, is not elected on the basis of population. The 1955 Act created 58 senatorial districts on an arbitrary, clearly political compromise motivated, area basis. The result is obvious, the one voter-one vote ratio is neither sought or desired and of course is not attained. The figures, graphs and statistics set forth in plaintiffs' complaint correctly and unequivocally depict a clear picture of population disparities in state senatorial districts. Dividing the state's population, 10,081,133, by the number of senatorial districts, 58, we find that if such districts were to be based on population, there should be 173,812 voters (using this term as being synonymous with population for purposes of the present illustration) in each district. Such is not the case. By way of illustration the average district in the City of

Chicago has some 196,994 voters; the remainder of Cook County excluding Chicago averages 263,000 voters per district. Moreover, within Chicago itself, as well as "downstate", discrepancies exist in relative district population figures. And finally, unlike the lower house no reapportionment or redistricting is provided for.

Plaintiffs' complaint alleges that the above discriminates against certain voters, particularly against those such as themselves who live in metropolitan as opposed to rural areas. This fact can hardly be denied. However, I am of the opinion that these conditions do not constitute, as contended by plaintiffs' complaint, even an unreasonable much less an invidious discrimination as prohibited by the Fourteenth Amendment.

We do not have before us any allegations that the State's Constitution or statutory provisions are not being complied with. We do not have before us and are not considering a situation wherein both houses of a bicameral legislature are elected on the basis of a weighted voting system which ignores population. We are not, in my considered judgment, considering an area apportionment system which creates a per voter-per vote ratio that would shock the conscience of the court. Nor are we considering, there being no such allegation in the complaint, a system gerrymandering the senatorial districts according to race, ethnic background or economic position. (See *Gomillion* v. *Lightfoot*, 364 U. S. 339). On the other hand we are considering a plan intended to somewhat counter-balance the relative political powers of the urban and agrarian voters. We are considering a plan intended to assure each group control in only one house of a bicameral legislature.

The actions of the State of Illinois are in conformity with the provisions of its Constitutional Amendment of 1954 and Act of 1955, which provide for a bicameral legislature wherein one house is truly based on population, vote for vote, with provisions for periodic changes to correspond to population changes, and the other house is based on the geographical locations of the voters who elect its members. This is precisely what the Amendment and Act here ques-

tioned were intended to do for Illinois. In this regard, plaintiffs call the court's attention to wording of the 1954 Amendment which calls for the creating of senatorial districts based primarily upon area considerations. After showing major discrepancies to exist generally between Chicago and "downstate" in the number of square miles constituting the districts (7.3 square miles in the 23rd district which covers the least area, and 2,199 square miles in the 40th district which covers the greatest area), they suggest to the court that area, no less population, was not used as a basis in drawing the districts. This unfair interpretation of the word area is without merit, it being legal folly to contend that the Amendment intended to equate representation in the senate in proportion to square miles. Such a view would have our system of government retrogressing to a feudal arrangement where land ownership was synonymous with political power.

Prior to the 1954 Amendment and the 1955 Act, and since 1901, neither Illinois legislative house was reapportioned, notwithstanding the existence of provisions permitting, indeed calling for, such action. Dissatisfaction existed and a political solution was neccessary. Unlike many of its sister states, Illinois took affirmative action. A solution took the form of this Amendment and the ensuing Act, the former being ratified by 87% of the voters of metropolitan Cook County in a public referendum. The Act clearly was a compromise in order to settle, apparently satisfactorily to both sides, some legislative equalization between voters in agrarian and rural areas an the one hand and urban or large city populations on the other. In adopting this political and practical compromise, Illinois has done no more and no less in my opinion than to follow the example of the founding fathers in the Constitutional Convention at Philadelphia. Having recognized the necessity for protecting minority voting rights and local sovereignty, the founding fathers adopted the system still in use providing for the election of our bicameral Congress. As in Illinois, election to the upper house is based on geographical area, or if you will, a weighted voting system. Election to the lower house is based on

population similar to Illinois. Should that which is deemed proper when observed in the presence of the federal government be suddenly deemed improper when associated with a sovereign state? Must the subject be more royal than the king? Must the State be more democratic than the United States?

Necessarily, I am well aware of atypical distinctions between the federal government and the individual states. My reliance on this analogy is limited somewhat by these nuances. The states as sovereign pre-existing smaller units created the larger unit, the federal government. Contrastingly, in apportionment cases we view the states in a different perspective; as the larger unit creating the smaller. And further, the smaller unit in apportionment cases lacks the element of sovereignty possessed by the states in their relationship to the federal government. However, these distinctions do not render for naught this analogy. In both instances the purposes were similar, to protect minority rights and check unopposed majority control. The methods selected to achieve the desired purposes are similar, and by large the results have been similar.

I might further observe that if as plaintiffs contend, both houses of a bicameral legislature were required to be elected on a similar population apportionment basis, one would be justified in seriously questioning the need or the wisdom in retaining a bicameral as opposed to a unicameral legislature.

I am not mindful of the many cases wherein courts, for the most part three-judge federal courts similar to this, have held particular state apportionment methods invidiously discriminatory. *Davis* v. *Synhorst*, 217 F. Supp. 492; *Sincock* v. *Duffy*, 215 F. Supp. 169; *Mann* v. *Davis*, 213 F. Supp. 577; *Thigpen* v. *Meyers*, 211 F. Supp. 826; *Sims* v. *Frink*, 208 F. Supp. 431; *Moss* v. *Burkart*, 207 F. Supp. 885; *Toombs* v. *Fortson*, 205 F. Supp. 248; *Scholle* v. *Hare*, 116 N. W. 2d 350. However, assuming *arguendo* their ability better to prognosticate subsequent and eventual action to be taken by the Supreme Court on this issue, in none of these cases were the facts identical, or in the semantics of the law "on all fours," with those of the

instant case. For that matter in all but *Scholle* both houses were allegely malapportioned. Moreover, in *Toombs* the court, although holding the apportionment method of the Georgia General Assembly to invidiously discriminate, (both houses were apportioned on an area basis) indicated its belief that only one house of a bicameral legislature need be elected on the basis of population apportionment.

My opinion on this issue is not without judicial support. Most recently, on June 12, 1963, a three-judge court sitting in the Southern District of Ohio decided *Nolan* v. *Rhodes* which is reported in the June 25, 1963, United States Law Week, Vol. 31, No. 50, at page 2641. In considering the Ohio apportionment scheme the court had before it a situation not too unlike that in Illinois, distinguishable in that the Ohio lower not the upper house was apportioned on an area basis. As in Illinois one house (the senate in Ohio) was apportioned on the basis of population. The court rejected plaintiffs' contention that both houses of a bicameral legislature must be apportioned on a strict population basis and held that Ohio representative districting did not constitute an invidious discrimination. In this regard see also *Clark* v. *Carter*, U.S.D.C. Ky., June 20, 1963, mentioned in Federal Supplement "Judicial Highlights", Vol. 207, No. 2, p. 2; *Sobel* v. *Adams*, 214 F. Supp. 811; *Wright* v. *Rockefeller*, 211 F. Supp. 460; *Jackman* v. *Bodine* decided by the New Jersey Superior Court on March 1, 1963; *Maryland Committee For Fair Representation* v. *Tawes*, 184 A. 2d 715, which is very similar factually to the instant case; also *Donovan* v. *Holzman*, 8 Ill. 2d 78 which had occasion to consider the same apportionment act presently before the court. See also: *Lisco* v. *McNichols*, 208 F. Supp. 471; *Westberry* v. *Vandiver*, 206 F. Supp. 276; *State of Wisconsin* v. *Zimmerman*, 205 F. Supp. 183; *Mikell* v. *Rousseau*, 183 A. 2d 817.

Needless to say the divergent views found in the above cited opinions are a clear indication that this general issue has not yet been decided by the Supreme Court. Such a decision should be forthcoming in the relatively near future as most of the cases cited in this memorandum (I would hope and anticipate that this case will join

them) are presently pending before the Court. However, I am of the opinion that a comparison of the Supreme Court opinions somewhat related to this issue does support the position I here have taken. In *Baker* v. *Carr*, the Court held that jurisdiction existed and that a complaint alleging the unconstitutionality of state legislative apportionment practice could state a valid claim of action. In *W.M.C.A.* v. *Simon* and *Scholle* v. *Hare*, the Court reaffirmed and reiterated this position. However, the Court did not hold that a system of apportionment not based solely on population would constitute *per se* invidious discrimination. Moreover, the Court did not have before it a complaint admitting that one house of a bicameral legislature was in fact apportioned on a population basis. As I interpret *Baker* v. *Carr*, the Court, limited by the narrow scope of the issues before it, instructed lower corts to scrutinize and review apportionment methods presented to them and in so doing determine the existence or non-existence of a rational policy or plan as distinct from an irrational, no-policy, invidiously discriminatory system. In this regard, Justice Brennan writing for the Court majority stated at p. 266:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action".

Also, at page 265, Justice Stewart in his concurring opinion states:

> "The court does not say or imply that there is anything in the federal constitution to prevent a state acting not irrationally from choosing any electoral legislative structure it thinks best suited to the interests, temper and customs of its people".

In my opinion the Illinois system wherein one house of a bicameral legislature is not apportioned on a population

basis, but rather, is apportioned with a definite and not irrational or capricious intention in mind of balancing the divergent political interests of the state's large metropolitan area against the interests of the primarily rural "downstate" area, does present a reasonable plan. Further, this plan does in fact permit a reasonable, not a capricious or absurd, check upon the political power of the largely populated urban area. The term check as used in the preceding sentence is not synonymous with control.

The Supreme Court in *Gray* v. *Sanders*, 372 U. S. 368, on the basis of the facts there before it, although inapposite to the present issue, goes to great pains to make this distinction clear. In *Gray* v. *Sanders* the Court unequivocally held that in elections (including primary nominating elections where controlled by the state) within an already determined geographical unit, in that case a state, be the elections for federal or state wide offices *other than legislators*, all forms of "weighted voting" are *per se* unconstitutional. In such elections all who participate must have an equal vote; one person-one vote. Why would the Court emphasically emphasize and re-emphasize the fact that the law of the case did not necessarily apply to bicameral legislatures if in fact it intended to include such bicameral legislatures within the ambit of the one person-one vote requirement?

The complaint fails to plead sufficient facts to justify this court in finding that the Illinois method of apportioning its senatorial districts, considered as it must be together with the method for apportioning lower house districts, invidiously discriminates against the plaintiffs.

The complaint is dismissed at plaintiffs' costs.

JUDGE AUSTIN *dissents.*

APPENDIX B

Received July 31, 1962

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 63 C 291

JOSEPH GERMANO, et al., *Plaintiffs*,

vs.

OTTO KERNER, as Governor of the State of Illinois and Chairman of the State Electoral Board, et al., *Defendants*.

Before SCHNACKENBERG, Circuit Judge; CAMPELI, C.J. and AUSTIN, District Judges.

AUSTIN, District Judge, dissent:

Because great weight and stress has been given to the fact that the challenged 1954 constitutional amendment received approval of the Illinois electorate by a substantial majority less than nine years ago, a more thorough understanding of the legislative history which preceded that choice is necessary.

The original constitutions of thirty-six States, including Illinois, provided for the election of both Houses of their bicameral legislatures on a vote for vote basis. The three constitutions of Illinois prior to 1954 provided for selection of both Houses on a population basis and further provided for reapportionment each decade, based on the decennial census, to preserve the vote for vote principle. For ninety years, while the rural areas of the State, in the 101 counties outside of Cook, contained a majority of the voters, there was assiduous compliance with the constitutional requirement of reapportionment. During that period, the minority urban voters made no request for control of one of the legislative Houses to "protect our minority interests," nor did the rural majority ever suggest that such a provision would be fair and just.

As the 20th Century started, a population trend developed which threatened rural control of the legislature. To meet that threat and abate it, the rural legislators in both Houses wilfully and illegally for more than forty years forswore their constitutional duty to reapportion the State contrary to what they had done before their control was threatened.

Although bills to reapportion, pursuant to the constitution, were introduced during that period, at most sessions of the legislature, the rural oligarchy, voting as a block, defeated each one. Repeated but fruitless appeals were made to both State and Federal Courts to compel compliance with the constitution. In this atmosphere of frustration and hopelessness the present constitutional amendment was conceived. In effect, the ultimatum of the feudal barons to the urban majority was this: We will restore to you one-half of the constitutional rights we have withheld for forty years if you will abandon forever the other half of those rights. It was with a spirit of resignation, with the gun to their head, that the weary majority capitulated. Although constitutionally entitled to a whole loaf, they accepted a crumb. This is the "compromise" solution alluded to in the opinion of my colleagues.

This constitutional amendment fails to provide for reapportionment of the Senatorial Districts, despite future population changes, and forever cedes to the rural minority 60% of the Senate, and with it, the attendant veto power over the will of the majority. It constitutes, in my opinion invidious discrimination. The implementing legislation redistricting the State's Senatorial Districts, is even less defensible. At the present time, less than 29% of the voters of Illinois elect a majority of the Senate.

Distinction is sought to be made on the ground that the acknowledged discrimination is not based on race, ethnic background, or economic position, and therefore, is not invidious. However, the test of invidious discrimination is not limited to these factors alone.

In *Donovan* v. *Holzman*, 8 Ill. 2nd 87, 97 (1956), the Illinois Supreme Court said:

> "It is clear that the purpose of separate Senatorial and Representative Districts was to insure popular representation in one House and to insure downstate control in the other."

In regard to the present Senatorial apportionment, I find most apt the words of Justice Clark in *Baker* v. *Carr*, 369 U.S. 186, 258, (1961):

> "If present representation has a policy at all, it is to maintain the status quo of invidious discrimination at any cost."

As has heretofore been indicated, less than 29% of the population of Illinois can elect a majority of the Senate. In *Sims* v. *Frink*, 208 F. Supp. 431, (D.C. Ala 1962), the Court held that a plan of Senate apportionment, where only 19.4% of the electorate could elect the majority of the Senators, was invidiously discriminatory. In *Moss* v. *Burkhart*, 207 F. Supp. 885, (D.C. Okla. 1962), invidious discrimination was found where 26% of the people elected the majority of the lower House and 20% elected a majority in the Senate. After remand of *Baker* v. *Carr*, *supra*, a proposed new Tennessee plan of Senatorial apportionment, more representative than is presently provided in Illinois, was held to be "utterly arbitrary and lacking in rationality." Its only consistent pattern is one of invidious discrimination." [206 F. Supp. 341, 358, (D.C. Tenn. 1962)] In *Thigpen* v. *Meyers*, 211 F. Supp. 826 (D.C. Wash. 1962), the election of a majority of the State Senators by 35.6% of the State's population was held to be invidiously discriminatory In *Scholle* v. *Hare*, 367 Mich. 176, 116 N.W. 2nd 350, the election of a majority of the Senate by 28% of the people was deemed invidious.

Courts in other reapportionment cases have held that the fact that an electorate has recently rejected measures to reapportion the legislature according to population or approved a plan nearly identical to that adopted by the

Illinois voters in 1954, is not a factor to be considered in determining whether invidious discrimination exists. In the *Thigpen* case, *supra*, the voters of Washington, twenty-four days before the court's ruling, defeated an initiative measure which sought to redistrict the legislature according to population. In commenting on this, the court stated [211 F. Supp. at 832]:

> "We are asked to decline jurisdiction because the voters of Washington in the general election of November 6, 1962 defeated an initiative measure designed to reapportion the Washington legislature according to population revealed by the Federal census of 1960. Our answer is concise and direct. We have no way of knowing whether the measure was defeated because a majority did not desire reapportionment or whether they didn't approve of the proposed method or whether they didn't understand it, . . . or whether the opponents were better organized than the proponents. It makes no difference. The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority."

Likewise, in the *Scholle* case, *supra*, the Michigan voters in 1952 rejected a constitutional amendment calling for equal representation in the Senate and had at the same election adopted a plan very similar to that which Illinois voters approved in 1954.

The need or wisdom in retaining a bicameral legislature is questioned if both Houses are elected on a population apportionment basis. The best answer to that is contained in a publication of the Twentieth Century Fund, entitled "One Man—One Vote," collating the views of fifteen constitutional law experts and political scientists as expressed at a conference held in New York City on June 15, 1962:

> "Nor is it true that two houses based on population will be mirror images of each other. They will, rather, present different reflections or combinations of the various elements that make up the population. For one thing, one house will have more members than the other, representing smaller districts. The length of

terms will differ. In addition, members of one house may be elected from single-member districts, while multi-member constituencies are used in the other house. And, not least, politicians are human beings whose differing personalities produce institutions of differing qualities.

"A number of states offer contemporary evidence that two houses based on population are by no means duplicates of one another. In Massachusetts both houses are apportioned on the basis of population; the two houses are among the most representative in the country. But the House has 240 members, the Senate 40, and even under control of the same party the two bodies manage to disagree often enough. In Washington and Oregon both houses are based on population; though less disparate in size than the Massachusetts chambers (there are about half as many senators as representatives), the two houses are quite different in political outlook."

Finally, the last resort of those seeking to justify legislative apportionment such as is involved here is that it is analagous to that of the Congress of the United States where election to the lower House is based on population and the United States Senate is composed of two Senators from each State regardless of the representative population of the States. My Brother Campbell has indicated that he is well aware of the atypical distinctions between the Federal Government and the individual States, and that he is not unmindful of the many cases which have rejected the "Federal analogy" holding that type of apportionment invidiously discriminatory and cites authorities with which I concur.

In addition to the cases heretofore cited, I refer again to "One Man—One Vote," *supra*, which succinctly refutes, in my opinion, the contentions here urged:

"A second major point on which the conferees were agreed is that the principle of apportionment on the basis of population is equally applicable in both houses of a state legislature. The fact that all voters have an

equal voice in the choice of one house would be no reason to give some voters more weight than others in electing the second chamber.

"The arguments for basing representation in one state legislative chamber on something other than people are the familiar ones: principally, that the rural population has special interests requiring protection by disproportionate voting power. Two further arguments are made.

"*First*, it is pointed out that in Congress the House represents people and the Senate states. This is said to provide precedent and justification for a similar 'Federal plan' in the state legislature, with one house representing people and the other counties or some similar geographic unit. But the analogy is false. The United States was created by thirteen sovereign states, and the Constitution embodies a theory of federalism which divides sovereign power between the nation and the states. A key device for protecting their residual sovereignty was the equal state voice in the Senate. Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, [or senatorial districts], by contrast, were never independent or sovereign. They did not create the states but were created by them. They are wholly creatures of the states and may at any time be merged, divided or abolished by state governments.

(Bracketed material added.)

"Federalism as a political theory has had and continues to have value as a device of compromise permitting the joining of lesser sovereignties into greater unions; an example in process is the European Economic Community. But to speak of federalism within a state is to reduce a great principle to an absurdity. 'The United States Senate is both irrelevant and improper as a model for representation within a state.' Professor Paul David of the University of Virginia has written, because 'a state is not a federal union of sov-

ereign counties.' Too often, the argument for a 'Federal plan' of representation in state legislatures is born of simple ignorance of its actual background and implications. At worst, it may be advanced as a disingenuous cover for the disenfranchisement of urban and suburban voters.

"*Second*, it is contended that a bicameral legislature would have no purpose if both houses were representative of population. This argument assumes two propositions: that the only function of bicameralism is to provide contrasting bases of representation in the two houses (i.e., one people and the other 'area'), and that making both houses representative of population would make the second house a mirror of the first and hence redundant. Neither proposition can be supported.

"The second house has a function quite apart from giving preferred political status to one population group—the function of providing checks and balances in the legislative process, of assuring more mature and deliberate consideration before a law is enacted. That was in fact the reasoning that underlay the adoption by many states during the nineteenth century of a population basis for both houses of their legislatures.

"Later in that century, and in this, factors other than population were often introduced, by constitutional amendment or by failure to reapportion. Those who held political power abandoned population representation in order to retain their control in the face of population changes that they saw coming. Such philosophical justifications as the so-called 'Federal plan' were designed to obscure the real motivation, just as today most of the elaborate arguments against representation on the basis of people are simply covers for a naked struggle to retain political power.

"The justification for bicameralism remains the provision of checks and balances. Bicameralism may also serve to further the very objective of representing the people equitably in a legislature. In any dis-

tricting geographic features are bound to cause some inequalities of population among districts. When there are two houses, an area that is somewhat underrepresented in one may be given a compensating advantage in the other and minor inequities in apportionment thus be balanced off.

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"There is no justification for making one house of a state legislature reflect the will of all the voters and the other the will of particular regions or classes."

In addition the Federal Advisory Commission on Intergovernmental Relations, a federal commission created by Congress for the purpose of conducting a continual study of federal, state and local governmental problems, recently completed an exhaustive study of the apportionment of state legislatures. This commission, composed of congressmen, governors, state legislators, county officials, city officials and public members, came to the following conclusion as to the proper basis for state legislative apportionment [Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures, pp. 67-73 (U.S. Govt. Printing Office, December 1962)]:

"'*Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population.*

"The Fourteenth Amendment to the United States Constitution is an amendment designed for the protection of the people. It is not intended to protect political subdivisions, minority views, or any particular form of governmental structure. The Fourteenth Amendment is concerned with one thing, and one thing only—that each person be treated equally in the eyes of the law of each and every State.

"In applying the requirement that each person be treated equally in the eyes of State law to the question of apportionment of seats in the State legislature,

only one interpretation is possible. That interpretation requires that each man's vote must count the same as every other man's vote. The State has no authority to classify people according to where they live —urban or rural areas—the type of work they do—laborer or banker—the type of education they have had—high school or college graduate—and authorize such classes to elect representatives to the State legislature in such a manner as to permit the vote of the members of any such class to have more weight in the election of State legislators than the members of any other class. Therefore, the Commission believes that population is the only fair and acceptable method of apportioning seats in the State legislature.

* * * * * * *

"Except to the extent that they are represented according to their numbers and that they have an opportunity to present their views to that body, minorities are not entitled to protection in the State legislature. Protection of minority interests or views does not mean the minority should be in a position to veto the desires of the majority. The protection given minority views and interests should not be a veto power in the legislative process, since other adequate protections are offered by both Federal and State constitutions. * * * * * *."

In the light of the foregoing, I would hold that Article IV, Section 6 of the Constitution of Illinois and the implementing statutes, Ill. Rev. Stat. 1961, Ch. 46 §§ 158-3 and 158-5, are invalid and void because they deprive and continue to deprive the Plaintiffs of liberty and property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

R. B. Austin,
Judge, United States District Court.

Dated: July 30, 1963.

APPENDIX C

Article IV, Section 6, as amended, of the Constitution of Illinois and the implementing statutes, Ill. Rev. Stat. Ch. 46, §§ 158-2—158-5 (1962 Supp.):

"§ 6. Senatorial districts-Redistricting-Number of senators-Terms.

"The General Assembly in 1955 shall redistrict the state for the purpose of electing state senators. There shall be fifty-eight senatorial districts. Cook county shall have twenty-four of the districts. These twenty-four districts shall be located as follows: Eighteen in the territory that is within the present limits of the city of Chicago; and six in the territory that is in Cook County outside such corporate limits. The remaining one hundred and one counties of the state shall have thirty-four of the senatorial districts.

"All senatorial districts shall be formed of contiguous and compact territory. In their formation, area shall be the prime consideration.

"The senatorial districts shall be numbered one, two, three, and so forth, including fifty-eight. Each such district shall elect one senator, whose term of office shall be four years. Senators elected in districts bearing even numbers shall be elected in 1956 and every four years thereafter; and senators elected in districts bearing odd numbers shall be elected in 1958 and every four years thereafter."

Senatorial and Representative Apportionment.
(Act of 1955)

An Act *to apportion the State of Illinois into senatorial and representative districts and to repeal an Act herein named.*

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. As used in this Act, and unless the context otherwise requires:

a. All boundaries shall be such boundaries as they existed on November 2, 1954.

b. Where a street or other way is used as a boundary line between districts, the boundary shall be the center line of such street or other way, and if such street or other way is not continuous a projection thereof shall be understood.

c. Where a township is named the reference is to all of said township, if not otherwise indicated, excepting any portion of such township that may have been within the corporate limits of the City of Chicago on November 2, 1954.

d. Where a township is named it is also considered to be the Town of ——— (such named township).

§ 2. The State is divided into 58 senatorial districts and 59 representative districts in the manner hereinafter provided.

§ 3. There shall be six senatorial districts in that part of Cook County which is outside the City of Chicago, to be numbered and bounded as follows:

District 1: The townships of Berwyn, Cicero, Elk Grove, Leyden, Maine, Norwood Park, Oak Park and River Forest, and that part of Proviso township lying north of Cermak road crossing such township.

District 2: The townships of Lemont, Lyons, Palos, River-

side and Stickney, and that part of Proviso township lying south of Cermak road crossing such township.

District 3: The townships of Barrington, Hanover, Palatine and Schaumburg.

District 4: The townships of Evanston, New Trier, Niles, Northfield and Wheeling.

District 6: The townships of Bremen, Calumet, Orland and Worth, and that part of Rich township lying north of a line described as follows: Beginning at the intersection of the western boundary of the township and the George Brennan highway, northeast on such highway to the Flossmoor road, east on such road to the Bloom township line.

District 8: The townships of Bloom and Thornton, and that part of Rich township lying south of a line described as follows: Beginning at the intersection of the western boundary of the township and the George Brennan highway, northeast on such highway to the Flossmoor road, east on such road to the Bloom township line.

§ 4. There shall be 18 senatorial districts in the City of Chicago, to be numbered and bounded as follows:

District 5: Starting at the intersection of Lake Michigan and Pershing road, follow the lake shore in a southeasterly direction to 83rd street, west on 83rd street to Yates boulevard, south on Yates boulevard to 85th street, west on 85th street to South Chicago avenue, northwest on South Chicago avenue to 83rd street, west on 83rd street to Cottage Grove avenue, north on Cottage Grove avenue to Pershing road, northeast on Pershing road to the point of beginning at Lake Michigan.

District 7: Starting on Lake Michigan at the mouth of the Chicago river, follow the river west to the intersection with its north branch, northwest on the north branch of the Chicago river to Chicago avenue, west on Chicago avenue to Ashland avenue, south on Ashland avenue to Madison street, west on Madison street to Sacramento boulevard, south on Sacramento boulevard to 16th street, east on 16th street to Western avenue, north on Western avenue to Roosevelt road, east on Roosevelt road to the south branch

of the Chicago river, southwest on the south branch of the Chicago river to Canal street, south on Canal street to 29th street, east on 29th street to Canal street, south on Canal street to 31st street, east on 31st street to Wentworth avenue, north on Wentworth avenue to 29th street, east on 29th street to the Chicago, Rock Island & Pacific railroad right-of-way, north on the Chicago, Rock Island & Pacific railroad right-of-way to Cermak road, east on Cermak road to Lake Michigan, follow the lake shore generally north to the point of beginning at the mouth of the Chicago river.

District 9: Starting at the intersection of 31st street and Wentworth avenue, south on Wentworth avenue to 43rd street, west on 43rd street to the city limits, follow the city limits in a generally northeastern direction to 31st street, east on 31st street to the point of beginning at Wentworth avenue.

District 10: Starting at the intersection of the northern city limits at Central avenue and Dowagiac avenue, south on Central avenue to Goodman street, southeast on Goodman street to Central avenue, south on Central avenue to Belmont avenue, east on Belmont avenue to the north branch of the Chicago river, northwest on the north branch of the Chicago river to its junction with the North Shore Channel, north on the North Shore Channel to the city limits at Devon avenue, follow said city limits in a generally western direction to the point of beginning.

District 11: Starting on Lake Michigan at its intersection with Cermak road, follow the lake shore generally southeast to Pershing road, southwest on Pershing road to Cottage Grove avenue, south on Cottage Grove avenue to 83rd street, west on 83rd street to Indiana avenue, north on Indiana avenue to 73rd street, west on 73rd street to State street, north on State street to 63rd street, west on 63rd street to Wallace street, north on Wallace street to Garfield boulevard, east on Garfield boulevard to Wentworth avenue, north on Wentworth avenue to 29th street, east on 29th street to the Chicago, Rock Island & Pacific railroad right-of-way, north on the Chicago, Rock Island & Pacific railroad right-of-way to Cermak road, east on Cermak road to the point of beginning at Lake Michigan.

District 12: Starting at the intersection of 59th street and Damen avenue, south on Damen avenue to 75th street, west on 75th street to Western avenue, south on Western avenue to 87th street, west on 87th street to the city limits, follow the city limits to 51st street and Laramie avenue, south on Laramie avenue to 59th street, east on 59th street to the point of beginning at Damen avenue.

District 13: Starting at the intersection of Lake Michigan and 83rd street, follow the lake shore and the Indiana state line south to the city limits, west along the city limits to Stony Island avenue, north on Stony Island avenue to 83rd street, east on 83rd street to South Chicago avenue, southeast on South Chicago avenue to 85th street, east on 85th street to Yates boulevard, north on Yates boulevard to 83rd street, east on 83rd street to the point of beginning at Lake Michigan.

District 14: Starting at the intersection of 43rd street and Wentworth avenue, south on Wentworth avenue to Garfield boulevard, west on Garfield boulevard to Wallace street, south on Wallace street to 59th street, west on 59th street to Laramie avenue, north on Laramie avenue to 51st street, continuing north and east along the city limits to 43rd street, east on 43rd street to the point of beginning at Wentworth avenue.

District 15: Starting at the intersection of 59th street and Wallace street, south on Wallace street to 63rd street, east on 63rd street to State street, south on State street to 73rd street, east on 73rd street to Indiana avenue, south on Indiana avenue to 83rd street, east on 83rd street to South Park avenue, south on South Park avenue to 99th street, west on 99th street to Western avenue, north on Western avenue to 75th street, east on 75th street to Damen avenue, north on Damen avenue to 59th street, east on 59th street to the point of beginning at Wallace street.

District 17: Starting at the intersection of 83rd street and Stony Island avenue, south on Stony Island avenue to the city limits at 138th street, west along the city limits to Halsted street at 129th street, north on Halsted street to 103rd street, east on 103rd street to the Chicago and Western Indiana railroad right-of-way (Stewart avenue), north

on the Chicago and Western Indiana railroad right-of-way (Stewart avenue) to 99th street, east on 99th street to South Park avenue, north on South Park avenue to 83rd street, east on 83rd street to the point of beginning at Stony Island avenue.

District 19: Starting at the intersection of 99th street and the Chicago and Western Indiana railroad right-of-way (Stewart avenue), south on the Chicago and Western Indiana railroad right-of-way (Stewart avenue) to 103rd street, west on 103rd street to Halsted street, south on Halsted street to the city limits at 123rd street, follow the city limits generally west and north and finally east to 99th street and Western avenue, east on 99th street to the point of beginning at the Chicago and Western Indiana railroad right-of-way (Stewart avenue).

District 21: Starting at the intersection of Belmont avenue and Narragansett avenue, east on Belmont avenue to Pulaski road, south on Pulaski road to Kinzie street, west on Kinzie street to Kenton avenue, south on Kenton avenue to the city limits at Roosevelt road, west and north and again west along the city limits to the intersection of North avenue and Narragansett avenue, north on Narragansett avenue to the point of beginning at Belmont avenue.

District 23: Starting at the intersection of Sacramento boulevard, Ogden boulevard, and 16th street, east on 16th street to Western avenue, north on Western avenue to Roosevelt road, east on Roosevelt road to the south branch of the Chicago river, follow the south branch of the Chicago river southwest to Canal street, south on Canal street to 29th street, east on 29th street to Canal street, south on Canal street to 31st street, west on 31st street to Hamlin avenue, north on Hamlin avenue to 18th street, east on 18th street to Homan avenue, south on Homan avenue to Ogden boulevard, northeast on Ogden boulevard to the point of the beginning at Sacramento boulevard.

District 25: Starting at the intersection of Gordon terrace and Lake Michigan, follow the lake shore generally south to the mouth of the Chicago river, west on the Chicago river to its intersection with the north branch of said river, northwest on the north branch of the Chicago river's

westernmost channel to Wellington avenue, east on Wellington avenue to Racine avenue, north on Racine avenue to Irving Park road, west on Irving Park road to Clark street, northwest on Clark street to Montrose avenue, east on Montrose avenue to Sheridan road, south on Sheridan road to Buena avenue, east on Buena avenue to Clarendon avenue, south on Clarendon avenue to Gordon terrace, east on Gordon Terrace to the point of beginning at Lake Michigan.

District 27: Starting at the northern city limits at the intersection of the south line of Calvary cemetery and Lake Michigan, follow the lake shore generally south to Gordon terrace, west on Gordon terrace to Clarendon avenue, north on Clarendon avenue to Buena avenue, west on Buena avenue to Sheridan road, north on Sheridan road to Montrose avenue, west on Montrose avenue to Clark street, southeast on Clark street to Irving Park road, east on Irving Park road to Racine avenue, south on Racine avenue to Wellington avenue, west on Wellington avenue to the Chicago river, north on the Chicago river to its junction with the North Shore Channel, north on the North Shore Channel to the city limits at Devon avenue, east and north and finally east along the city limits to the point of beginning at Lake Michigan.

District 29: Starting at the intersection of Dowagiac avenue and Central avenue, south on Central avenue to Goodman street, southeast on Goodman street to Central avenue, south on Central avenue to Belmont avenue, west on Belmont avenue to Narragansett avenue, south on Narragansett avenue to the city limits at North avenue, west and continuing along the city limits in a generally northern direction and finally east to the point of beginning at Central avenue.

District 31. Starting at the intersection of Chicago avenue and Ashland avenue, south on Ashland avenue to Madison street, west on Madison street to Sacramento boulevard, south on Sacramento boulevard to Ogden boulevard, southwest on Ogden boulevard to Homan avenue, north on Homan avenue to 18th street, west on 18th street to Hamlin avenue, south on Hamlin avenue to 31st street,

west on 31st street to the city limits, follow the city limits in a genarally northern direction to Roosevelt road, north on Kenton avenue to Kinzie street, east on Kinzie street to Pulaski road, north on Pulaski road to Chicago avenue, east on Chicago avenue to the point of beginning at Ashland avenue.

District 33. Starting at the intersection of Belmont avenue and the north branch of the Chicago river, southeast on the north branch of the Chicago river's westernmost channel to Chicago avenue, west on Chicago avenue to Pulaski road, north on Pulaski road to Belmont avenue, east on Belmont avenue to the point of beginning at the north branch of the Chicago river.

§ 5. There shall be 34 senatorial districts in the State outside Cook County, to be numbered and bounded as follows:

District 16: The counties of Livingston and Woodford.

District 18: The counties of Marshall, Peoria and Stark.

District 20: The counties of Iroquois and Kankakee.

District 22: The counties of Edgar and Vermilion.

District 24: The counties of Champaign, Moultrie and Piatt.

District 26: The counties of Ford and McLean.

District 28: The counties of DeWitt, Logan and Macon.

District 30: The counties of Mason, Menard and Tazewell.

District 32: The counties of Hancock and McDonough.

District 34: The counties of Clark, Coles, Cumberland and Douglas.

District 35: The counties of DeKalb, Lee and Whiteside.

District 36: The counties of Adams, Calhoun, Pike and Scott.

District 37: The counties of Bureau and Henry.

District 38: The counties of Bond, Macoupin and Montgomery.

District 39: The counties of LaSalle and Putnam.

District 40: The counties of Christian, Fayette and Shelby.

District 41: The counties of DuPage and Will.

District 42: The counties of Clay, Clinton, Effingham and Marion.

District 43: The counties of Brown, Fulton and Schuyler.

District 44: The counties of Jackson, Monroe and Randolph.

District 45: The counties of Cass, Morgan and Sangamon.

District 46: The counties of Edwards, Jefferson, Wabash and Wayne.

District 47: The counties of Greene, Jersey and Madison.

District 48: The counties of Crawford, Jasper, Lawrence and Richland.

District 49: The counties of Perry, St. Clair and Washington.

District 50: The counties of Alexander, Pulaski, Union and Williamson.

District 51: The counties of Hardin, Johnson, Massac, Pope and Saline.

District 52: The counties of Boone, Lake and McHenry.

District 53: The counties of Henderson, Mercer and Rock Island.

District 54: The counties of Ogle and Winnebago.

District 55: The counties of Franklin, Gallatin, Hamilton and White.

District 56: The counties of Carroll, JoDaviess and Stephenson.

District 57: The counties of Knox and Warren.

District 58: The counties of Grundy, Kane and Kendall.

§ 6. There shall be seven representative districts in that part of Cook County which is outside the City of Chicago, to be numbered and bounded as follows:

District 1: The townships of Bloom, Calumet, Rich and Thornton.

District 2: The townships of Bremen, Lemont, Lyons, Orland, Palos and Worth, and that part of Stickney township lying to the south of the Chicago projection dividing such township.

District 3. The townships of Berwyn and Cicero, and that

part of Stickney township lying to the north of the Chicago projection dividing such township.

District 4: The townships of Oak Park, Riverside and River Forest, and that part of Proviso township lying to the east of a line described as follows: Beginning on the northern boundary of such township on Ninth avenue in the village of Melrose Park, follow such street to its intersection with the Northwestern railroad right-of-way, northwest along such Northwestern railroad right-of-way to the alley between 14th avenue and 15th avenue in the village of Maywood, south along such alley to the Chicago and Great Western railway right-of-way, southeast along such Chicago and Great Western railway right-of-way to Ninth avenue, south along Ninth avenue to the northern boundary of Riverside township.

District 5: That part of the townships of Leyden and Norwood Park lying south of Bryn Mawr avenue crossing such townships, and that part of Proviso township lying to the west of a line described as follows: Beginning on the northern boundary of such township on Ninth avenue in the village of Melrose Park, follow such street to its intersection with the Northwestern railroad right-of-way, northwest along such Northwestern railroad right-of-way to the alley between 14th avenue and 15th avenue in the village of Maywood, south along such alley to the Chicago and Great Western railway right-of-way, southeast along such Chicago and Great Western railway right-of-way to Ninth avenue, south to the northern boundary of Lyons township.

District 6: The townships of Barrington, Elk Grove, Hanover, Maine, Niles, Palatine, Schaumburg and Wheeling, that part of the townships of Leyden and Norwood Park lying north of Bryn Mawr avenue crossing such townships, and all of Northfield township except Sections 34, 35 and 36.

District 7: The townships of Evanston and New Trier, and Sections 34, 35 and 36 of the township of Northfield.

§ 7. There shall be 23 representative districts within the City of Chicago, to be numbered and bounded as follows:

District 8: Starting at the intersection of Lake Michigan on the east and the south line of Calvary cemetery projected

east, follow such lake shore south to Berwyn avenue, west on Berwyn avenue to the North Shore Channel, north on the North Shore Channel to the city limits, generally east and north along such city limits to the point of beginning at the lake.

District 9: Starting at the intersection of Berwyn avenue and Western avenue, east on Berwyn avenue to Broadway avenue, south on Broadway avenue to Racine avenue, south on Racine avenue to Wrightwood avenue, west on Wrightwood avenue to its intersection with the north branch of the Chicago river, northwest on the north branch of the Chicago river to Addison street, east on Addison street to Western avenue, north on Western avenue to the point of beginning at Berwyn avenue.

District 10: Starting at the intersection of Berwyn avenue and Broadway avenue, east on Berwyn avenue to Lake Michigan, follow the shore of Lake Michigan in a southerly direction to Belden avenue, west on Belden avenue to Lincoln Park West, south on Lincoln Park West to its intersection with Clark street, northwest on Clark street to Belden avenue, west on Belden avenue to Racine avenue, north on Racine avenue to Broadway avenue, north on Broadway avenue to the point of beginning at Berwyn avenue.

District 11: Starting at the intersection of Lake Michigan and the mouth of the Chicago river, follow the Chicago river west to the north branch thereof, northwest on such north branch of the Chicago river's westernmost channel to Wrightwood avenue, east on Wrightwood avenue to Racine avenue, south on Racine avenue to Belden avenue, east on Belden avenue to Clark street, southeast on Clark street to Lincoln Park West, north on Lincoln Park West to Belden avenue, east on Belden avenue to Lake Michigan, south along the shore of Lake Michigan to the point of beginning at the mouth of the Chicago river.

District 12: Starting at the intersection of Addison street and Pulaski road, east on Addison street to the north branch of the Chicago river, southeast on the north branch of the Chicago river to the Chicago, Milwaukee, St. Paul, and Pacific Railroad right-of-way, southwest on the Chicago, Milwaukee, St. Paul, and Pacific Railroad right-of-

way to Bloomingdale road, west on Bloomingdale road to Damen avenue, north on Damen avenue to Churchill street, west on Churchill street to Leavitt street, south on Leavitt street to Bloomingdale road, west on Bloomingdale road to Pulaski road, north on Pulaski road to the point of beginning at Addison street.

District 13: Starting at the intersection of the northern city limits at Devon avenue and Cicero avenue, east on the north boundary of the city limits to the North Shore Channel, southeast on the North Shore Channel to Berwyn avenue, east on Berwyn avenue to Western avenue, south on Western avenue to Addison street, west on Addison street to Cicero avenue, north on Cicero avenue to the point of beginning at the city limits.

District 14. Starting at the intersection of Devon avenue and Cicero avenue, south on Cicero avenue to Belmont avenue, west on Belmont avenue to the city limits, follow the city limits generally north and east to the point of beginning at Cicero avenue.

District 15: Starting at the western city limits at the intersection of Oriole avenue and Belmont avenue, east on Belmont avenue to Cicero avenue, north on Cicero avenue to Addison street, east on Addison street to Pulaski road, south on Pulaski road to Division street, west on Division street to the city limits at Austin avenue, follow the city limits generally north and west to the point of beginning at Belmont avenue.

District 16: Starting at the western city limits at the intersection of Austin avenue and Division street, east on Division street to Pulaski road, south on Pulaski road to Washington boulevard, east on Washington boulevard to Hamlin avenue, south on Hamlin avenue to Independence boulevard, south on Independence boulevard to Roosevelt road, west on Roosevelt road to the city limits at Austin avenue, north along such city limits to the point of beginning at Division street.

District 17: Starting at the intersection of Jackson boulevard and the south branch of the Chicago river, west on Jackson boulevard to Hamlin avenue, south on Hamlin avenue to Independence boulevard, south on Independence

boulevard to Roosevelt road, east on Roosevelt road to Sacramento boulevard, south on Sacramento boulevard to 16th street, east on 16th street to the south branch of the Chicago river, north along the river to the point of beginning at Jackson boulevard.

District 18: Starting at the intersection of Chicago avenue and the north branch of the Chicago river, west on Chicago avenue to Noble street, north on Noble street to Augusta boulevard, west on Augusta boulevard to Damen avenue, south on Damen avenue to Chicago avenue, west on Chicago avenue to Pulaski road, south on Pulaski road to Washington boulevard, east on Washington boulevard to Hamlin avenue, south on Hamlin avenue to Jackson boulevard, east on Jackson boulevard to the south branch of the Chicago river, north on the south branch of the Chicago river to its junction with the north branch of the Chicago river, northwest on the north branch of the Chicago river to the point of beginning at Chicago avenue.

District 19: Starting at the intersection of the Chicago, Milwaukee, St. Paul, and Pacific railroad right-of-way and the north branch of the Chicago river, south on the westernmost channel of the river to Chicago avenue, west on Chicago avenue to Noble street, north on Noble street to Augusta boulevard, west on Augusta boulevard to Damen avenue, south on Damen avenue to Chicago avenue, west on Chicago avenue to Pulaski road, north on Pulaski road to Bloomingdale road, east on Bloomingdale road to Leavitt street, north on Leavitt street to Churchill street, east on Churchill street to Damen avenue, south on Damen avenue to Bloomingdale road, east on Bloomingdale road to the Chicago, Milwaukee, St. Paul, and Pacific railroad right-of-way, northeast on the Chicago, Milwaukee, St. Paul, and Pacific railroad right-of-way to the point of beginning at the Chicago river.

District 20: Starting on Lake Michigan at the mouth of the Chicago river, follow the river west to the junction with its south branch, south on such south branch to Wallace street, southeast and south on Wallace street to 25th street, east on 25th street to Canal street, south on Canal street to 29th street, east on 29th street to Canal street, south on

Canal street to 31st street, east on 31st street to Stewart avenue, south on Stewart avenue to 43rd street, east on 43rd street to State street, north on State street to 37th street, east on 37th street to South Parkway, south on South Parkway to 42nd street, east on 42nd street to Drexel boulevard, south on Drexel boulevard to 42nd place, east on 42nd place to Lake Michigan, north along the lake shore to the point of beginning at the mouth of the Chicago river.

District 21: Starting at the intersection of 43rd street and Wentworth avenue, east on 43rd street to State street, north on State street to 37th street, east on 37th street to South Parkway, south on South Parkway to South Park avenue, south on South Park avenue to 63rd street, west on 63rd street to State street, south on State street to 73rd street, west on 73rd street to Halsted street, north on Halsted street to 63rd street, east on 63rd street to Wallace street, north on Wallace street to 59th street, east on 59th street to Wentworth avenue, north on Wentworth avenue to the point of beginning at 43rd street.

District 22: Starting at the intersection of 42nd place and Lake Michigan, west on 42nd place to Drexel boulevard, north on Drexel boulevard to 42nd street, west on 42nd street to South Parkway, south on South Parkway to South Park avenue, south on South Park avenue to 63rd street, west on 63rd street to State street, south on State street to 73rd street, east on 73rd street to Stony Island avenue, north on Stony Island avenue to 63rd street, west on 63rd street to Cottage Grove avenue, north on Cottage Grove avenue to 52nd street, east on 52nd street to Drexel boulevard, north on Drexel boulevard to 47th street, east on 47th street to Lake Michigan, northwest along the lake to the point of beginning at 42nd place.

District 23: Starting at the intersection of 47th street and Lake Michigan, west on 47th street to Drexel boulevard, south on Drexel boulevard to 52nd street, west on 52nd street to Cottage Grove avenue, south on Cottage Grove avenue to 63rd street, east on 63rd street to Stony Island avenue, south on Stony Island avenue to 75th street, east on 75th street to Jeffery boulevard, south on Jeffery boulevard to 79th street, east on 79th street to Lake Michigan,

northerly along the lake shore to the point of beginning at 47th street.

District 24: Starting at the intersection of 79th street and Lake Michigan, west on 79th street to Jeffery boulevard, south on Jeffery boulevard to 93rd street, west on 93rd street to Stony Island avenue, south on Stony Island avenue to 111th street, west on 111th street to Halsted street, south on Halsted street to the city limits, south following such limits in a generally eastern direction to the Indiana state line, north along such state line and the Lake Michigan shore to the point of beginning at 79th street.

District 25: Starting at the intersection of 75th street and Jeffery boulevard, west on 75th street to Stony Island avenue, north on Stony Island avenue to 73rd street, west on 73rd street to Halsted street, south on Halsted street to 111th street, east on 111th street to Stony Island avenue, north on Stony Island avenue to 93rd street, east on 93rd street to Jeffery boulevard, north on Jeffery boulevard to the point of beginning at 75th street.

District 26: Starting at the intersection of the city limits at 123rd street and Halsted street, north on Halsted street to 63rd street, west on 63rd street to Morgan street, south on Morgan street to 68th street, west on 68th street to Ashland avenue, south on Ashland avenue to 73rd street, west on 73rd street to Damen avenue, south on Damen avenue to 75th street, west on 75th street to the city limits, follow the city limits generally south and east to the point of beginning at Halsted street.

District 27: Starting at the intersection of Garfield boulevard and Wallace street, south on Wallace street to 63rd street, west on 63rd street to Morgan street, south on Morgan street to 68th street, west on 68th street to Ashland avenue, south on Ashland avenue to 73rd street, west on 73rd street to Damen avenue, south on Damen avenue to 75th street, west on 75th street to the city limits, north along the city limits to 65th street, north on Cicero avenue to 55th street, east on 55th street to Garfield boulevard, east on Garfield boulevard to the point of beginning at Wallace street.

District 28: Starting at the intersection of 59th street

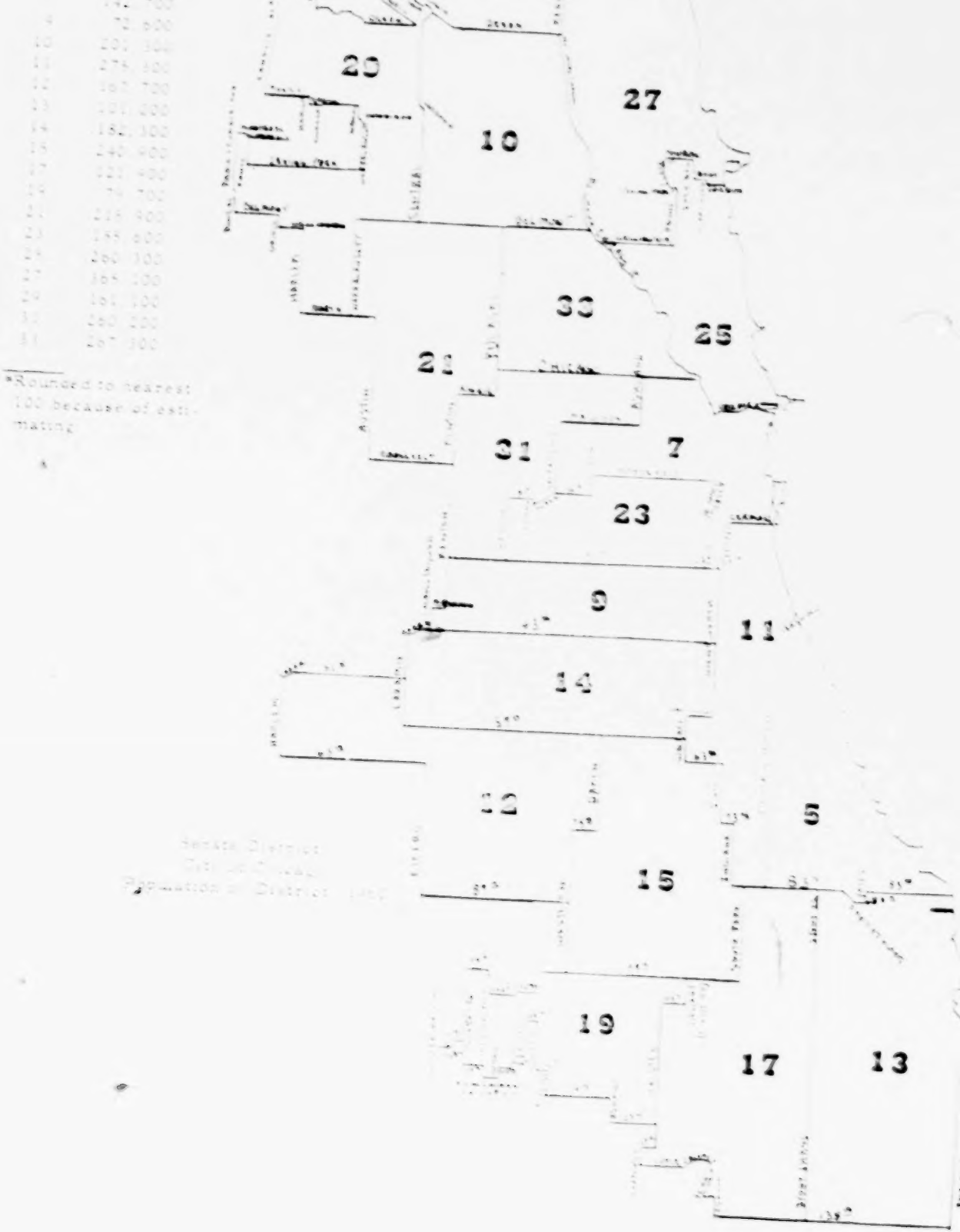
APPENDIX F

Senate Districts—City of Chicago

st. No.	Population
	275,000
	142,700
	72,600
	201,300
	275,300
	167,700
	101,000
	182,300
	140,900
	121,900
	74,700
	215,900
	155,600
	260,100
	365,100
	161,100
	260,200
	267,300

ded to nearest
because of esti-
ns

Senate Districts
City of Chicago
Population per District 1960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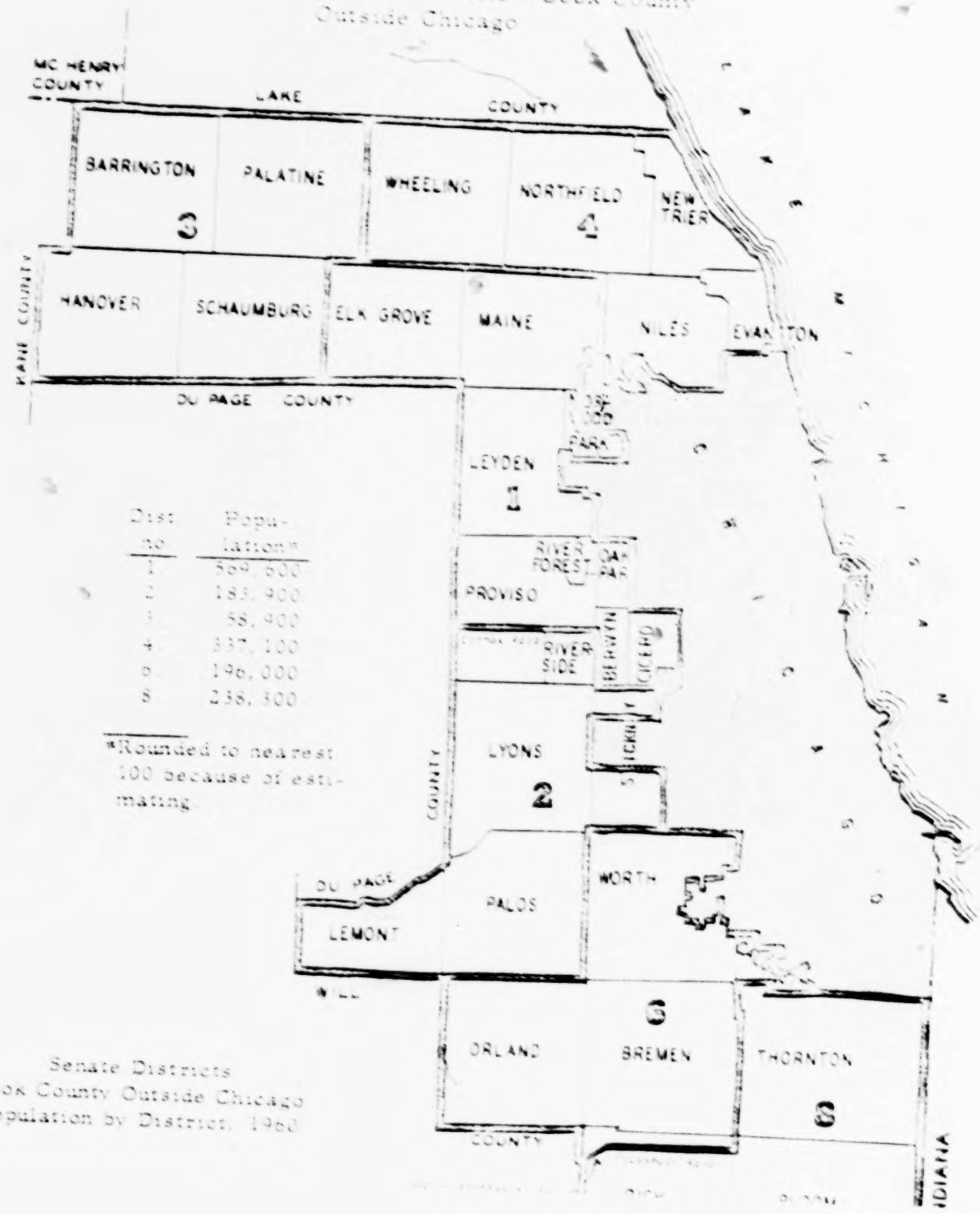
APPENDIX G

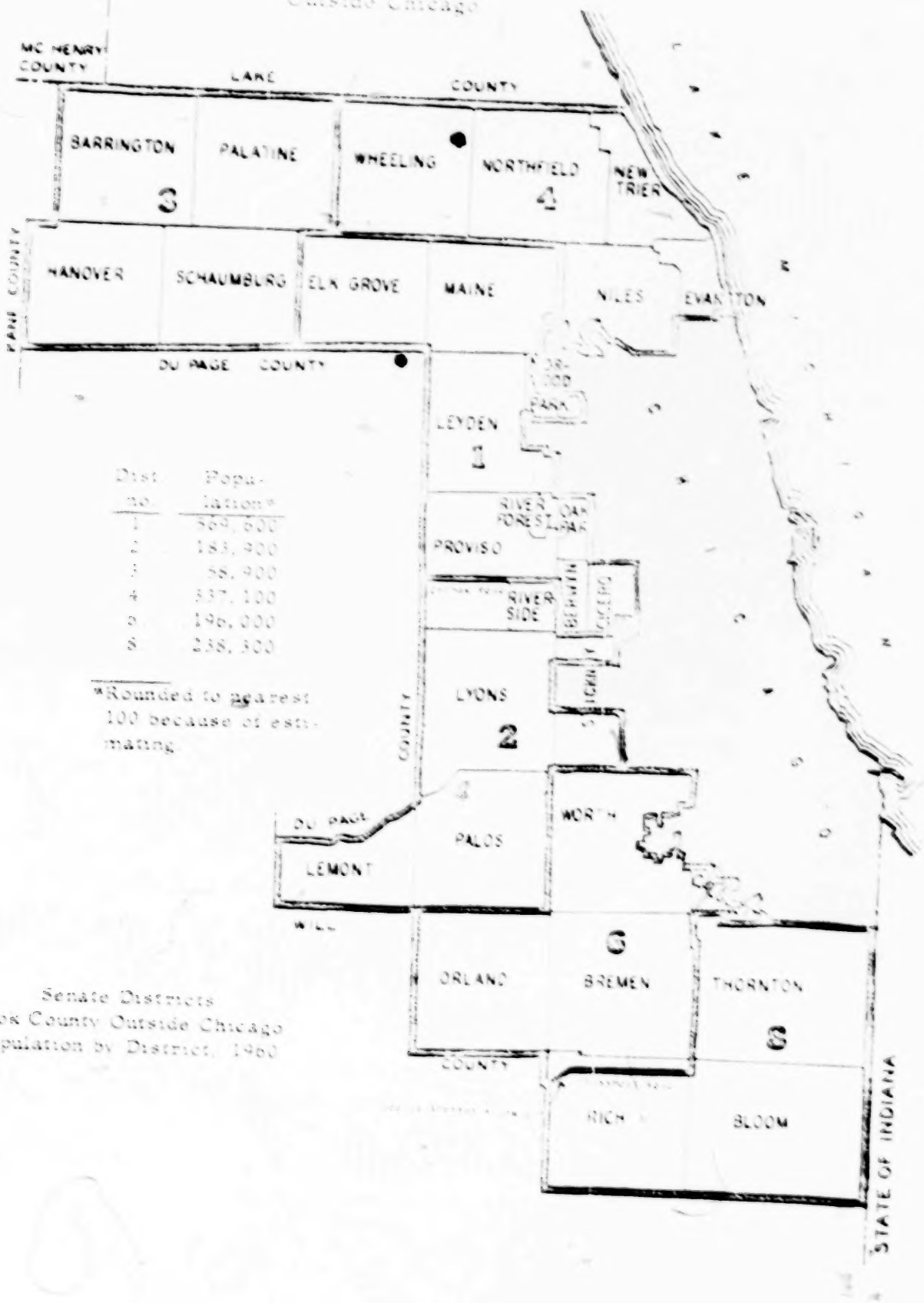
Senate Districts--Cook County Outside Chicago



Dist no.	Population*
1	569,600
2	183,900
3	58,900
4	337,100
6	196,000
8	238,300

*Rounded to nearest 100 because of estimating.

Senate Districts
Cook County Outside Chicago
Population by District, 1960



Dist. no.	Population*
1	569,600
2	183,900
3	98,900
4	537,100
5	196,000
6	238,300

*Rounded to nearest 100 because of estimating.

Senate Districts
Cook County Outside Chicago
Population by District, 1960

APPENDIX B

Senate Districts--Outside Cook County

Dist No.	Population
19	84,740
20	210,550
22	135,625
24	116,726
26	161,031
28	100,461
30	169,166
32	124,230
34	53,502
36	88,586
38	150,350
40	101,324
42	86,911
44	88,826
46	115,370
48	82,557
41	505,076
43	102,300
45	56,910
47	67,040
49	197,649
51	73,310
53	259,172
55	66,936
57	295,262
59	90,313
31	57,436
52	398,192
54	176,377
56	247,871
58	76,302
50	87,535
37	82,867
39	248,136

Senate Districts
State outside Cook County
Population by District, 1960

19	210,930
20	125,625
22	116,726
24	167,031
26	100,461
28	169,160
30	124,230
32	53,502
34	88,566
35	150,350
36	101,329
37	66,911
38	88,826
39	119,370
40	82,587
41	505,076
42	103,300
43	56,910
44	87,646
45	197,649
46	73,310
47	259,172
48	66,936
49	295,262
50	90,313
51	57,436
52	398,192
53	176,377
54	247,871
55	76,302
56	87,535
57	82,867
58	248,136

Senate Districts
State outside Cook County
Population by District, 1960

MOTION TO AFFIRM

Office-Supreme Court, U.S.
FILED
DEC 19 1963
JOHN F. DAVIS, CLERK

NO. 636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH GERMANO, et al., *Appellants*,

v.

OTTO KERNER, as Governor of the State of Illinois and Chairman of the State Electoral Board, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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MOTION TO AFFIRM

Clyde Beals, David Davis, Joseph R. Mallory, William McKnight, Jr., Carl Schweinfurth, Harold B. Steele, Mrs. Faye Striebinger, and The Illinois Agricultural Association, defendants-intervenors in the court below and appellees in this Court, move pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States that the final judgment of the District Court be affirmed.

Question Presented

Whether, in a state in which the governor (and other state executive officers) are elected by the majority in statewide elections, and in which the state House of Representatives is apportioned according to population, the Fourteenth Amendment condemns a departure from the population standard in apportionment of the state Senate for the purpose of balancing the interests of the single, highly urbanized county wherein more than half of the state's population is concentrated with the interests of the remainder of the state.

of the preference for inaction until the advent of a degree of consensus greater than fifty-one to forty-nine." Lucas, "Legislative Apportionment and Representative Government," 61 *Mich. L. Rev.* 711, 765 (1963).* Illinois has not paralyzed its government, for in its legislature the necessary consensus is very often reached.**

Appellants espouse a different political theory, the view that the only standard ever permissible in legislative apportionment is the strict population standard. Any other method of apportionment, appellants say, is "invidious discrimination." (Jur. St., pp. 10-12.)

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* See Neal, "Baker v. Carr: Politics In Search of Law," [1962] *Supreme Court Review* 252, 281:

> "Stated otherwise, the question is whether it is permissible to insist that legislative action be based on a broader consensus than a bare majority. Every device that limits the power of a majority is, in effect, a means of giving disproportionate representation to the minority. A constitutional principle that puts unequal districting in doubt also calls into question, by necessary implication, provisions requiring special majorities for particular kinds of legislation, such as approval of bond issues in municipal referenda or adoption of proposed constitutional amendments by legislatures or passage of legislation over an executive veto. Why should it not reach, as well, other procedural rules or devices that give obstructive power to minorities, such as the filibuster or the seniority system for choosing committee chairmen?"

And see Konopezynski, "Minority Rights," 10 *Encyc. Soc. Sci.* 525-527 (1933).

** The Seventy-third General Assembly of the State of Illinois, which met in 1963, passed 1,616 of the 2,915 bills introduced. Illinois State Bar Assn., "Legislation Checklist," p. 8 (August 22, 1963). Of the bills passed, the governor approved 1,376 and gave partial approval to another 8 as to which he exercised his item veto. See State of Illinois, Legislative Reference Bureau, *Final Legislative Synopsis and Digest of the Seventy-third General Assembly*, pp. 8-10 (1963). Figures for earlier sessions are compiled in Steiner and Gove, *Legislative Politics in Illinois*, pp. 36-37 (1960).

The choice between the system for which appellants contend and the different system actually adopted in Illinois requires, then, a choice of competing ideas of the best organization of a representative government. The theory that appellants espouse can certainly not be established as "right" or "reasonable" to the exclusion of the theory of government adopted in Illinois. Population may indeed have an important place in representation (as it has in Illinois). But the "absolute principle of equal populations"* for which appellants contend has nothing to recommend it as the sole and exclusive standard of apportionment except a deceptive simplicity. See Lucas, "Legislative Apportionment and Representative Government," 61 *Mich. L. Rev.* 711, 764-767 (1963).

In state constitutions in the United States, population has never been the exclusive standard of apportionment. The thirteen states in the union in 1790 had not adopted it as such. See Dixon, "Legislative Apportionment and the Federal Constitution," 27 *Law & Contemp. Prob.* 329, 385 (1962). Nor had the states that ratified the Fourteenth Amendment, as shown by the material collected by Mr. Justice Frankfurter, dissenting in *Baker* v. *Carr*, 369 U.S. at 310-315. (Mr. Justice Frankfurter's historical account of apportionment, while not deemed relevant to the jurisdictional issues decided in *Baker*, throws considerable light on the general understanding of what apportionment standards are proper.) More recently, in the Act admitting Hawaii, 73 Stat. 4 (1959), Congress approved and "found to be republican in form and in conformity with the Constitution of the United States" a state constitution adopted in 1950 which in Art. III, § 2 gave 10 senators to the population center of Oahu (1960 population 500,409) and 15

* The phrase is Professor De Grazia's. De Grazia, *Apportionment and Representative Government*, pp. 2-8 (1963).

senators to the other islands (1960 population 132,363.)* In the Act admitting Alaska, 72 Stat. 339 (1958), Congress approved and "found to be republican in form and in conformity with the Constitution of the United States" a state constitution adopted in 1956 which in Art. XIV created senatorial districts of widely variant population, e.g., Barrow-Kobuk (1960 population 5,693) and Anchorage-Palmer (1960 population 88,021).**

In the United States, the Congress established by the Constitution is the outstanding example of apportionment on standards other than population for the purpose of affording due participation to areas and communities with diverse interests too vital to be placed under the control of a simple 49-51 majority. The Federal Convention of 1787 did not apportion either house of Congress solely according to population. The "large" states secured apportionment of the House according to free population plus three-fifths of slave population. The "small" states successfully insisted upon equality in the Senate. "With proportional popular representation established for one house, equal state representation for the other was inevitable, both from the ideas of representation that were current at the time and from the division of opinions in the convention." Farrand, *The Framing of the Constitution*, p. 107 (1913).

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* The Hawaii constitution approved by Congress is printed as Appendix A to S. Rep. No. 80, 86th Cong., 1st Sess. (1959). The population figures are from United States Department of Commerce, Bureau of the Census, *Census of Population: 1960*, vol. 1, part A, p. 13-7.

** The Alaska constitution approved by Congress is printed as Appendix A to H.R. Rep. No. 624, 85th Cong., 2d Sess. (1957). The population figures are from United States Department of Commerce, Bureau of the Census, *Census of Population: 1960*, vol. 1, part A, p. 3-9.

This Court has said (in a case not dealing with legislative apportionment) that a "conception of political equality" held by the founding fathers may belong "to a bygone day" because of the passage of the post-Civil War Amendments to the Constitution. *Gray* v. *Sanders*, 372 U.S. 368, 377 (1963). The Illinois state legislature is not patterned on the Congress of "a bygone day." By directing that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," Section 2 of the Fourteenth Amendment makes the Congress consist of one house apportioned substantially according to population and one house apportioned on a basis requiring concurrence of the representatives of more than a majority of population in order to enact laws. That is also the structure adopted in Illinois. Under the Seventeenth Amendment, United States Senators are "elected by the people" of their respective constituencies. So are state senators in Illinois. Moreover, although the President of the United States continues to be elected by weighted voting through the electoral college, the governor of Illinois is elected by direct, statewide popular vote.

The state government of Illinois is not federal, nor are its senatorial districts equivalent to states. But the legislature of the United States and the legislature of Illinois both make general laws applicable to areas and communities of people whose interests are sometimes diverse, whose views of the public good are not always similar. The structure of both legislatures is founded on political compromise intended to facilitate reconciliation of such diverse interests through the legislative process. Surely the legislative structure of the United States is reasonable; surely, when the people of Illinois pattern their state legislature on it, their action is not unconstitutional.

The conflict between the theory of population as a single permissible standard of apportionment and the theory of checks and balances, or broader consensus, chosen by the people of Illinois is not resolved by the Fourteenth Amendment. For, as the Court said in *Clark* v. *Kansas City*, 176 U.S. 114, 119 (1900):

> "The reasoning of the cases we need not repeat. It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations."

With respect to apportionment of state legislatures, the rule of Equal Protection could scarcely be other than one permitting the states "wide latitude." The states of the United States range in area from 1,214 square miles (Rhode Island) to 586,400 square miles (Alaska); in population (1960) from 16,782,000 (New York) to 226,000 (Alaska); in percent of population classified as urban (1960) from 88.6 (New Jersey) to 35.2 (North Dakota); in value added to goods by manufacture (1959) from $17,523,000,000 (New York) to $59,000,000 (North Dakota). United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States, 1962*, pp. 10, 20, 170, 780-781. These factors and the many others that differentiate the social and economic structure of the various states demonstrate the necessity of allowing each state scope to form its own reasonable political structure adapted to its own circumstances. As to the specific situation now before the Court—the distribution of political power between Cook County and downstate Illinois, the Court said in *MacDougall* v. *Green*, 335 U.S. 281, 283-284 (1948):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Nothing in the Fourteenth Amendment condemns either the principle of senatorial apportionment expressed in Article IV, § 6 of the Illinois constitution or the manner in which that provision has been implemented. The allocation of senators to Cook County and to the downstate area and the boundaries of the senatorial districts are reasonable exercises of the discretion of the state. The number of senators necessary to represent the 101 downstate counties and the boundaries of their districts depend upon an assessment of local conditions—of the size and configuration of the area in which a senator can maintain proper contact with his constituents and in which campaigns can be conducted without excessive cost, of the number of members there ought to be in the Senate for adequate deliberation, of the number and identity of counties that can be combined in a single senatorial district without giving a county (or other unit) such dominance in the district that the senator is responsive only to it, and the like. Inspection of the map of Illinois' senatorial districts (Jur. St., p. 66) shows that in downstate districting the General Assembly observed county lines, formed districts of con-

tiguous counties, and obtained an approximate equality of area. Appellants complain because the state constitution does not require regular redistricting of the Senate as well as of the House of Representatives. (Jur. St., pp. 8, 13.) The argument is without substance, for appellants did not (and could not) show any events that have outmoded senatorial districting since it was established in 1955.

To overturn provisions of the constitution and laws of Illinois, appellants must show that no state of facts may reasonably be conceived to justify them. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961). Appellants have completely failed to make any such showing. On the contrary, the people of Illinois have adopted a reasonable apportionment policy well suited to their state.

CONCLUSION

For the foregoing reasons, the final judgment of the District Court should be affirmed.

Respectfully submitted,

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Of Counsel

APPENDIX: LEGISLATIVE APPORTIONMENT PROVISIONS OF THE CONSTITUTION OF ILLINOIS (ART. IV, § § 6, 7, and 8).

§ 6. The General Assembly in 1955 shall redistrict the state for the purpose of electing state senators. There shall be fifty-eight senatorial districts. Cook county shall have twenty-four of the districts. These twenty-four districts shall be located as follows: Eighteen in the territory that is within the present corporate limits of the city of Chicago; and six in the territory that is in Cook county outside such corporate limits. The remaining one hundred and one counties of the state shall have thirty-four of the senatorial districts.

All senatorial districts shall be formed of contiguous and compact territory. In their formation, area shall be the prime consideration.

The senatorial districts shall be numbered one, two, three, and so forth, including fifty-eight. Each such district shall elect one senator, whose term of office shall be four years. Senators elected in districts bearing even numbers shall be elected in 1956 and every four years thereafter; and senators elected in districts bearing odd numbers shall be elected in 1958 and every four years thereafter. (Amendment adopted general election Nov. 2, 1954. Proclaimed adopted Nov. 19, 1954.)

§ 7. The General Assembly in 1955 and in 1963, and every ten years thereafter, shall redistrict the state for the purpose of electing state representatives. There shall be fifty-nine representative districts. In the 1955 redistricting Cook County shall have thirty of the districts. These thirty districts shall be located as follows: Twenty-three in the territory that is within the present corporate limits of the City of Chicago; and seven in the territory that is in Cook

County outside such corporate limits. In the 1955 redistricting, the remaining one hundred and one counties of the state shall have twenty-nine of the representative districts. In redistricting subsequent to the 1960 census, and thereafter, the fifty-nine representative districts shall be divided among (1) that part of Cook County that is within the present corporate limits of the City of Chicago, (2) that part of Cook county that is outside such corporate limits, and (3) the remaining one hundred and one counties of the state, as nearly as may be, as the population of each of these three divisions bears to the total population of the state.

Representative districts shall be formed of contiguous and compact territory, and shall contain, as nearly as practicable, a population equal to the representative ratio; outside of Cook County, such districts shall be bounded by county lines unless the population of any county entitles it to more than one representative district. The representative ratio for the entire state shall be the quotient obtained by dividing the population of the state by fifty-nine. No representative district may contain less population than four-fifths of the representation ratio.

Three representatives shall be elected in each representative district in 1956 and every two years thereafter. The term of office shall be two years. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he shall see fit; and the candidates highest in votes shall be declared elected. (Amendment adopted general election Nov. 2, 1954. Proclaimed adopted Nov. 19, 1954.)

§ 8. In performing its duties under Sections 6 and 7 of this amendment, the General Assembly shall redistrict and reapportion in a single legislative enactment. If, however,

the regular session of the General Assembly in 1955 as to both senatorial and representative districts or in 1963, or any ten years thereafter as to representative districts, fails by the first day of July to redistrict the state into such districts, then the redistricting shall be accomplished by a commission. Within thirty days after such first day of July, the state central committee of each of the two political parties, casting the highest votes for governor at the last preceding gubernatorial election, shall submit to the governor of the state a list of ten persons. Within thirty days thereafter, the governor shall appoint the commission of ten members, five from each list. If either of the state central committees fails to submit the list within the specified time, the governor, within the specified time, shall appoint five members of his own choice from the party of such committee. Each member of the committee shall receive $25.00 a day, but not more than $2,000 for his service.

This commission shall redistrict the state into senatorial districts and into representative districts in the manner specified above. This commission shall file with the secretary of state a full statement of the numbers of the senatorial and representative districts and their boundaries. No such statement shall be valid unless approved by seven members of such commission.

After such statement is filed, senators and representatives shall be elected according to the statement and the districts therein determined, until a redistricting and reapportionment are thereafter made by the General Assembly as provided in this amendment. If, however, the statement is not filed within four months after the commission is appointed it shall stand discharged. Thereupon, all senators, scheduled for election at the next election for state senators, and all state representatives shall be nominated and elected at the next election from the state at large.

Following such an election at large, the General Assembly at its next regular session shall perform the duties specified in this amendment. But if such a General Assembly fails to perform these duties, then another commission, as specified in this Section 8, shall be appointed in like manner, with like duties, and power, and with like effect; and so forth until a valid senatorial and representative redistricting and reapportionment are secured in this 1950 decade and each decade thereafter. But there can be only one valid senatorial and representative redistricting and reapportionment during a particular decade. (Adopted general election Nov. 2, 1954. Proclaimed adopted Nov. 19, 1954.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 636

JOSEPH GERMANO, ET AL., *Appellants*,

v.

OTTO KERNER, ET AL., *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO ADVANCE AND BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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Appellants have heretofore and in accordance with Rule 15 filed a Jurisdictional Statement, reference to which is made hereby, and which is incorporated herein. Appellees have filed a Motion to Affirm, which Motion does not controvert any of the basic factual matter set forth in the Jurisdictional Statement.

Pursuant to Rule 43(4), Appellants move this Court to advance the hearing of this Appeal so that it may be considered along with, or soon after, *Lucas* v. *Forty-Fourth General Assembly of Colorado*, No. 508, in which this Court noted probable jurisdiction on December 9, 1963, and before a decision is rendered in the other legislative appor-

tionment cases already argued before the Court this Term.

Appellants' grounds to advance this cause are stated in this Brief in Opposition to the Motion to Affirm, which follows:

I. The Illinois Senate Apportionment Scheme Reflects a "Crazy-Quilt" Pattern

On pages three and four of their Motion to Affirm, Appellees make the following statement:

> "Appellants show *only* that Illinois senatorial districts, from each of which one state senator is elected, are not equal in population. On that fact alone, appellants base their contention that Illinois senatorial apportionment offends the Fourteenth Amendment. They ask this Court to hold that population is the exclusive permissible standard of apportionment of both houses of all state legislatures under all circumstances." (Emphasis supplied.)

Appellees' version of the facts and contentions of Appellants is misleading. True, Appellants firmly contend that only by holding that "one-man, one-vote" means "one-man, one full-vote" will this Court finally settle all the uncertainties which now enshroud legislative apportionment cases. As stated in the Jurisdictional Statement, if the Court sanctions any slight degree of vote dilution and debasement as not violative of the Fourteenth Amendment, Courts will be constantly inundated with apportionment cases presenting ever differing degrees of equality. (Jur. St., p. 11).

Appellants have appended to the Jurisdictional Statement (pp. 64-70) maps and charts which disclose gross and widespread inequalities in the populations of Illinois

Senate districts. While Appellants most emphatically urg the Court to rule that these population disparities in and themselves invalidate the Illinois senatorial apportionmen scheme, it is not true, as Appellees contend, that Appe lants have shown "only" inequalities of population. Thes same maps and charts, the accuracy and propriety of whic neither the Court below nor Appellees have challenged portray an irrational, "crazy-quilt" scheme of apportion ment. They disclose that thirty senators representing les than twenty-nine per cent of the State's population ca determine the destiny of a legislative proposal. Althoug this twenty-nine per cent minority of the populace con sists predominantly of rural citizens, this is not uniformly true. Six of the thirty least populous senate districts are situated in Chicago. Another is located in Cook County outside of Chicago. The remaining twenty-three of the thirty smallest districts are found in various parts of the State outside of Cook County, ranging from the 56th dis trict in the northwestern corner of Illinois to the 51st dis trict which is located in the far southeastern part of the State. (Jur. St., App. F, G, H and J, pp. 64-66, 69). Fur ther demonstrating this total lack of consistency is the fact that more than twenty-five per cent (nine of thirty-four) of the over-represented districts are Cook County districts. (Jur. St., App. J and K, pp. 69-70.)

Turning now to the under-represented citizens of Illinois, we find that the patern of under-representation is no less arbitrary and inconsistent than is that of over-representation. Twenty-four senate districts are under-represented. (Jur. St., App. J and K, pp. 69-70.) One would assume from reading the Appellees' Motion to Affirm that these would be the twenty-four districts allocated to Cook County, that this would be what the Appellees describe as "a check upon domination of the entire state by a single county."

(Mot. to Aff., p. 5.) But this is not so. Nine of these twenty-four districts in which there is less than ideal representation (Jur. St., p. 6) are located in various portions of Illinois outside of Cook County, including the far western part of the State (districts 53 and 47), the far northern sector (districts 52 and 54), the southern region (district 49), the easternmost areas (districts 41 and 52) and the center of the State (districts 45 and 18). (Jur. St., App. H, J and K, pp. 66, 69-70.) Only ten of the twenty-four under-represented districts are located in the City of Chicago. (Jur. St., App. J and K, pp. 69-70.) The remaining five districts evidencing vote dilution are in the suburbs of Cook County which are as philosophically and politically distinct from Chicago as are the most rural sectors of the State. (Jur. St., App. J and K, pp. 69-70.) We have then the following scheme of apportionment and discrimination in the Illinois Senate.

	Number of Districts	Number of Districts Over-represented	Number of Districts Under-represented
Chicago	18	8	10
Cook County—Outside of Chicago	6	1	5
Remainder of State	34	25	9
Totals	58	34	24

It is thus seen that there are three categories of discriminatees—(a) many Chicago citizens, (b) most Cook County suburbanites and (c) a substantial number of downstate residents. As stated in Appellants' Jurisdictional Statement, there are flagrant and egregious inequalities of district population and senatorial representation not only between the three general segments of the State—Chicago,

the Cook County suburbs and the areas outside of Chicago —but within each of these general segments. (Jur. St., pp. 6-7.)

As is evident from a mere perusal of the maps and charts attached to Appellants' Jurisdictional Statement, the Illinois Senate apportionment scheme abounds in voting power discrepancies and inconsistencies. Nor are the "crazy-quilt" tendencies limited to population figures, for the maps and charts disclose that the Illinois districts cannot be justified in terms of area figures, numbers of counties which have been combined in drawing district boundaries or on any other statistical basis. (Jur. St., App. F, G, H, I and J, pp. 64-69). Indeed, Appellees do not even attempt to justify the Illinois Senate districts on any of such grounds.

The Illinois Senate apportionment scheme is thus not unlike that described in *Baker* v. *Carr*, 369 U.S. 186, which Mr. Justice Clark described as a "crazy-quilt without rational basis." (369 U.S. at 254).

II. The Illinois Senate Apportionment Scheme Which Vests Perpetual Control in a Decided Minority of the State's Population Has Not Been Justified by Appellees Nor Can It Be Justified Under the Fourteenth Amendment.

In addition to ignoring or pretending that the "crazy-quilt" features of the Illinois apportionment scheme do not exist, Appellees have overlooked a much more fundamental and significant aspect of the system. Article IV, Section 6 of the Illinois Constitution and the implementing statutes enacted thereunder (Jur. St., App. C, pp. 43-60) specifically divide the State into three segments for purposes of apportionment. As noted above and in Appellants' Jurisdictional Statement (p. 5), these seg-

ments are Chicago, the Cook County suburbs and the remainder of the State. Except for one brief footnote reference at page 5 of their Motion to Affirm where Appellees state that "the constitution also recognizes a division within Cook County between the City of Chicago and its suburbs," this most obvious characteristic of the Illinois apportionment provisions is not only ignored but is subverted by the Appellees. Instead, they imply throughout their Motion to Affirm that Chicago and the Cook County suburbs are a single, monolithic whole, the residents of which have an identity of problems, interests, aspirations and social and political views. Based upon this faulty and spurious premise, Appellees then claim that the policy or "purpose" of the Senate scheme is to "balance" the "interests of the single, highly urbanized county" (Mot. to Aff., p. 1) or, stated otherwise, to place a "check upon the domination of the state by that single county" (Mot. to Aff., p. 3; see also pp. 5, 8, 10-11).

This is a belated attempt to ascribe to the constitutional and statutory provisions here in question a policy or a justification which was never intended, which could not have been intended for the reason that the purported evil sought to be overcome is non-existent, and which, even if intended, would be improper under the Fourteenth Amendment.

The Court below, although observing that the Illinois scheme "discriminates against certain voters, particularly against those such as themselves [the Appellants] who live in metropolitan as opposed to rural areas,"[1] could find no policy or rationale such as that offered by Appellees. Rather, as observed in the Jurisdictional Statement (p. 6), the Court below determined that Illinois senate apportionment rests upon "an arbitrary, clearly

[1] 220 F. Supp. at 232.

political compromise motivated, area basis," adding that the statistical materials submitted "correctly and unequivocally depict a clear picture of population disparities in state senatorial districts."[2]

In an effort to prove that what the Court below found to be an "arbitrary, clearly political compromise motivated" scheme of apportionment is in reality a rational means of controlling Cook County, Appellees rely upon *Donovan* v. *Holzman*, 8 Ill. 2d 87, 132 N.E.2d 501 (1956), and what is called an "official statutory explanation" of the 1954 constitutional amendment (Mot. to Aff., pp. 8-9). Neither of these references support the position of Appellees.

In the *Donovan* case the only question decided was whether the eighteen senatorial districts within the City of Chicago were (a) sufficiently contiguous and compact and (b) sufficiently uniform in area to satisfy the requirements of Article IV, Section 6 of the Illinois Constitution. *Donovan* did not even discuss the thirty-four "downstate" or six Cook County suburban senatorial districts. Regarding the eighteen Chicago districts, the Illinois Supreme Court held only that "on this record we cannot conclude that the legislature did not apply the principal [sic] of compactness nor give 'prime consideration' to area." (8 Ill. 2d at 97). To the extent that the *Donovan* case was concerned exclusively with the comparative "area" measurements of the eighteen Chicago Senate districts, it is evident that Appellees are grieviously in error when they cite *Donovan* for the proposition that the Illinois Supreme Court there "recognized" that the "policy" of Illinois senatorial apportionment is "to avoid putting the entire legislative power of the state in the hands of a single

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[2] 220 F. Supp. at 232.

county, and to insure the people of the whole state an effective voice in the legislative process." (Mot. to Aff., p. 8).

Appellee's reliance upon the "statutory explanation" is equally fallacious. This "explanation" states, *inter alia*, that the apportionment scheme is "based on a form of area representation" similar to that embodied in the United States Constitution. (Mot. to Aff., p. 9). Appellants need not at this time elaborate upon the inappropriateness of this "federal analogy," for the fallacy of this concept was discussed in the Jurisdictional Statement. (Jur. St., pp. 16-17). See *Gray* v. *Sanders*, 372 U.S. 368, 378. Apart from the "federal analogy" question, it should be noted that this "explanation" did not state that the constitutional amendment was intended to favor or discriminate against any group or groups of citizens, nor did it give any indication who would be the beneficiaries or discriminatees of the amendment. It did not inform the voters that the proposed scheme was a departure from the whole course of Illinois constitutional history which required equal representation in both houses of the legislature, as expressed in the Constitutions of 1818, 1848 and 1870, as well as in the Northwest Ordinance of 1787 and the Illinois Enabling Act of 1818. (Jur. St., pp. 7-8). Irrespective of its content the "explanation" was mere window dressing in light of the failure of the proposed constitutional amendment to afford the voters of Illinois an opportunity to select an effective system of representation based upon population as opposed to the proposed scheme which forced the citizenry to choose between perpetual minority rule in only one house or continued minority rule in both houses of the Illinois General Assembly. (See Jur. St., pp. 15-16). Finally, as Appellants have shown in the Jurisdictional Statement (pp. 15-16), even if the voters had been given

a fair choice in 1954, the rejection of a plan of apportionment based upon population would not be conclusive in determining whether the plan, as subsequently implemented, is presently violative of the Fourteenth Amendment.

Clearly, therefore, neither the *Donovan* case nor the "official statutory explanation" evidence any purpose or policy of placing a "check" upon the voters of Cook County. Appellees offer no other evidence that such a policy was intended. On the other hand, the Court below and the apportionment system itself indicate that the sole policy, if indeed it can be called such, was one of expediency. As has been noted, the constitutional and statutory apportionment provisions do not treat Chicago and the Cook County suburbs as a single entity, as a single voting bloc. Consistent with tradition and local and national experience, the Constitution distinguishes between Chicago with its 3.5 million residents and the Cook County suburban area with its 1.5 million citizens. Even assuming *arguendo* that either Chicago or the Cook County suburbs constitute homogenous, identifiable voting groups, the interests of one or the other of which are at times incompatible with those of the "downstate" area, it is evident on the basis of simple arithmetic that the 4.9 million downstate citizens need not fear domination by either group by reason of *per capita* representation. Admittedly, any such speculation is utter nonsense, for interest groups are not constant and unvarying. Issues determine interests and votes. No one can say today what issue will arise or how individual legislators will vote tomorrow. We set forth the foregoing arithmetic and categories simply to show that the apportionment provisions in question were not, and could not possibly have been, intended to "balance" Cook County

"interests" against "the interests of the remainder of the state" as the Appellees contend[3] (Mot. to Aff., p. 1).

Equally obvious is the fact that, even if the apportionment provisions had been designed to "check" or "control" some imaginary statewide dominance on the part of a monolithic Cook County electorate, the present scheme of apportionment fails to effectuate such a policy. As is shown in the preceding section of this brief, the Illinois Senate maps reflect an utter hodge podge of confusion. It was observed that of the twenty-four under-represented senate districts nine are located in "downstate" Illinois, outside of Cook County, while Chicagoans are victimized in but ten districts. Nearly one-half of the Chicago districts are over-represented. Only in the case of suburban Cook County has there been anything approaching consistency, five of six districts being disadvantaged while the sixth district is grossly over-represented to the extent that only three other senate districts have less population. The only conclusion one can reach is that *some* Chicago citizens, *some* suburban citizens and *some* downstate citizens are "protected" from the "dominance" of *other* Chicago citizens, *other* suburban citizens and *other* downstate citizens for reasons and by the operation of forces which neither have been expressed nor can be deduced.

The Illinois apportionment scheme having thus been shown neither to have been conceived in accordance with nor to effectuate any discernable policy, we are left with what was termed in *Baker* v. *Carr*, 369 U.S. at 226, as "a discrimination [which] reflects *no* policy, but simply arbi-

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[3] Interestingly enough, at pages 9 and 10 of their Motion to Affirm Appellees themselves question the urban-rural, downstate-Cook County distinction. In view of this, one is inclined to question why the Appellees are concerned with balancing the interests. The answer obviously is that the Illinois apportionment scheme is so poorly effectuated and so confusing that the Appellees themselves are not certain to what extent their interests are and are not protected.

trary and capricious action." Under the Fourteenth Amendment such a scheme must surely fail. But there is a much more fundamental defect inherent in Appellees' approach. The policy asserted by Appellees is clearly an afterthought, a contrivance born of desperation and designed to explain that which is inexplicable. Moreover, it is an attempt to justify, as euphemistically as possible, perpetual discrimination on a wholesale basis against urban citizens and in favor of rural citizens. Executed more skillfully in some cases and perhaps less adroitly in others, this type of retrospective rationalization has been and will be undertaken by every proponent of the *status quo* in every legislative reapportionment case until such time as it is made absolutely clear that the Fourteenth Amendment requires substantial equality of vote and representation in both houses of state legislatures. Nothing could more eloquently portray the need for a "one-man, one-full-vote" concept, which Appellees so derisively attack, than does the attempt of the Appellees to justify the Illinois discrimination.

Appellees argue that the Appellants and those similarly discriminated against are not harmed in that the Governor of Illinois, as well as other State officers, is elected pursuant to a statewide vote "in which a majority of the state taken as a whole controls." (Mot. to Aff., pp. 4-5). Appellees add that the majority of Illinois residents are doubly fortunate in that the lower House is constitutionally required to be reapportioned "according to population each decade, following the federal census." (Mot. to Aff., pp. 4-5).[4] Their position is apparently that the Governor and/or lower House can defend the majority against the minority by

[4] The Illinois Supreme Court on Saturday, January 3, 1964, sitting in emergency session, ruled that the membership of the Illinois House must be elected on an at-large basis in 1964. In addition, the Court denied motions to have the twenty-nine Senate seats up for election in 1964 filed on a state-wide basis.

vetoing and/or defeating legislative enactments which are contrary to the interests of the majority. Putting aside the complexities of mustering legislative majorities and the many facets of the administrative-legislative dichotomy, this is precisely the type of justification that one might anticipate from those who have been in control of the legislative processes of Illinois since 1901 or earlier. It is an attitude of inaction, of the *status quo*.[5] The beneficiaries of the present Illinois Senate apportionment scheme have long since enacted their legislative programs. As is alleged in the Complaint (Par. 18) and as was conceded by the Appellees in their Consent to District Court's Suggestion That Case Be Taken On The Complaint As filed, Appellants and those similarly situated bear a disproportionately large share of the tax burden of Illinois, while receiving a disproportionately small share of the appropriations and disbursements of State funds. In short, Appellees and those similarly situated no longer require absolute legislative control. They are content with the retention of legislative veto power exercised through their domination of the Illinois Senate. Having dominated the legislative councils for fifty or more years, the forces of the *status quo* may not be pleased at the prospect of relinquishing control of one house of a bicameral legislature, but they will happily settle for *perpetual* control of the remaining house and will concede the governorship to the majority forces in the bargain.

The fallacy of Appellees' arguments are obvious. Long before *Baker v. Carr* the Governor of Tennessee was elected by a majority of the voters, and in light of *Gray* v. *Sanders*, 372 U.S. 196, this is now a universal requirement. How-

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[5] Indeed, Appellees admit as much, stating at pages 11-12 of their Motion to Affirm that "our tradition is replete with examples of the *preference for inaction* until the advent of a degree of consensus greater than fifty-one to forty-nine." (Emphasis supplied.) Needless to say the instant case does not present a "fifty-one to forty-nine" situation but rather a perpetual twenty-nine to seventy-one disparity.

ever, the problems of modern-day state governments will not be solved by the creation of legislative impasses. The legislature must be an instrument of change and of development. If our purpose is stagnation, this could be accomplished simply and economically by dispensing with our legislatures (and establishing budgetary commissions to appropriate state funds.) Clearly, this is not our National or local aim. Ours is a government of the people, of people with tremendous problems and needs which only they can solve and satisfy. Accordingly, the people must be given the right to govern themselves in accordance with the will of the majority. If the Illinois system, which perpetually empowers less than twenty-nine per cent of the people to frustrate that will is permitted to stand, *Baker* v. *Carr* will become nothing more than an interesting but meaningless exercise in the law of jurisdiction and justiciability instead of the Magna Carta for the elector. By according to the majority the full vitality of their voting franchise in the Illinois Legislature, this Court will not have deprived the minority of a legislative forum in which to express its views. The minority can be adequately represented without the inevitability of vesting upon it veto power over the majority. A full vote should not be dependent upon where a man lives, the color of his skin, his religion or national origin. *Gomillion* v. *Lightfoot*, 364 U.S. 339.

III. Grounds Supporting Motion to Advance

This Appeal presents material and questions germane to the problem of state legislative apportionment which are not presented in the other cases currently before this Court. It is beyond question that the area of legislative apportionment is of vital importance to the Nation, and a tremendous responsibility rests with the Court in reaching a satisfactory adjudication of the issues there involved.

Therefore, the Court should have for its consideration all the information possible before making any ruling in this area.

Appellants seriously urge that the Court consider the factual peculiarities in the instant Appeal before undertaking to decide the crucial questions posed by the pending state legislative apportionment cases. For instance, the Court will note that the manner in which the Illinois voters approved the Senate apportionment scheme differs completely from the manner in which the voters of Colorado approved the constitutional amendment involved in *Lucas* v. *Forty-Fourth General Assembly of Colorado, supra.* In the *Lucas* case the proposed amendment approved by the voters came about through the popular initiative and referendum, a procedure which is not available to the voters of Illinois. Moreover, in *Lucas* the people were given a real choice of determining whether they wanted a system of representation in both houses based upon population or on the alternative basis which was approved by them. But notwithstanding these and other factual differences, Appellants vigorously contend and are prepared to argue that the "one-man, one-vote" principle is the only ultimate solution in all cases involving legislative apportionment.

Appellants are prepared to file their brief before the argument in *Lucas* and as the Court may so direct. Moreover, Appellants would, if required by the Court, waive any further reply; or, alternatively, would file a reply shortly after the argument. The appendices to Appellants' Jurisdictional Statement contain all of the opinions below, constitutional and statutory provisions, graphs and charts which uncontrovertedly reveal the current apportionment scheme as it relates to the Illinois Senate.

Conclusion

The gross discrepancies of representation which exist by virtue of the Illinois Senate apportionment scheme are uncontroverted in this case. Neither the Court below nor Appellees have presented any meaningful evidence to justify such discrepancies. Further, Appellants contend that the equal protection clause of the Fourteenth Amendment permits no justification for the unequal treatment of voters. A political commentator has appropriately expressed the crucial issue when, in commenting upon *Gray* v. *Sanders* and the "one-man, one-vote" principle on which the decision rested, he asked:

> "Why should it be permissible to use the device of unequal legislative districts, any more than the unit rule system, to give one man ten times the vote of another?"[6]

For the reasons set forth above, Appellants submit that probable jurisdiction of the Appeal should be noted, and that this Motion To Advance should be granted.

Respectfully submitted,

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[6] Anthony Lewis, N. Y. Times (Western Ed.), March 21, 1963, p. 6.

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PETITION FOR REHEARING

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Clyde Beals, David Davis, Joseph R. Mallory, William McKnight, Jr., Carl Schweinfurth, Harold B. Steele, Mrs. Faye Striebinger, and The Illinois Agricultural Association, appellees herein, respectfully petition pursuant to Rule 58 of the Revised Rules of this Court that rehearing be granted in this cause.

Statement

This case is an appeal from a judgment of a three-judge United States District Court for the Northern District of Illinois which sustained the existing apportionment of the State Senate of Illinois (220 F. Supp. 230). In a *per curiam* opinion announced June 22, 1964, this Court reversed the judgment below and remanded the case for further proceedings consistent with the views stated in *Reynolds* v. *Sims* (Nos. 23, 27, and 41) and the other cases relating to state legislative apportionment decided with *Reynolds* on June 15, 1964.

This Court's *per curiam* decision strikes down, in whole or in part, three sections of the Constitution of Illinois relating to legislative apportionment and the implementing statutes enacted by the Illinois General Assembly. These state constitutional provisions (Sections 6, 7, and 8 of Art. IV) cover the apportionment of both Senate and House of Representatives. The Court has disapproved the apportionment of the Senate and perhaps the method of apportionment of the House as well.

The Court made its grave and far-reaching judgment respecting Illinois legislative apportionment without permitting any defense of Illinois' interests beyond a motion to affirm filed by the appellees (defendants-intervenors in the court below) who now present this petition for rehearing. The District Court entered its judgment July 29, 1963. Appellants filed a notice of appeal fifty-seven days later, on September 24, 1963, and jurisdictional statement, motion to affirm, and appellants' brief in opposition to motion to affirm were thereafter filed in this Court, the last on January 7, 1964. Probable jurisdiction was not noted, and the case was decided without briefs or oral argument.

Reasons For Granting Rehearing

1. The decision of this Court calls for a fundamental alteration of the structure of the government of the State of Illinois. Applied to Illinois, the holding of *Reynolds* v. *Sims* that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (Slip Opinion, p. 33) means far more than a revision of the boundaries of state senatorial districts in order to equalize population. It means, rather, the destruction of a workable political compromise, adopted by the people of Illinois, through which there was an accommodation of the interests of the single

county containing a majority of the population of the state and the interests of the 101 other counties.

All Illinois, in the political sense, is divided into two parts: Cook County (Chicago and environs) and Downstate (all counties but Cook). Whether the single county of Cook (shown in black on the outline map on the following page) shall dominate the government of the entire state has been a crucial issue in Illinois politics since the population of the Chicago metropolitan area grew sufficiently large to threaten such dominance. There was no legislative reapportionment from 1901 until 1954, when the voters of the state adopted an amendment placing in the state constitution the provisions attacked in this case. The court below described the situation as follows (220 F. Supp. at 233):

> "Dissatisfaction existed and a political solution was necessary. Unlike many of its sister states, Illinois took affirmative action. A solution took the form of this Amendment and the ensuing Act, the former being ratified by 87% of the voters of metropolitan Cook County in a public referendum."

The new legislative structure, modeled on the Congress of the United States, set up a workable system of checks and balances. The House of Representatives was apportioned on the population standard, and Cook County received a majority of representatives. The Senate was apportioned on a geographic basis, and Downstate received a check on the power of Cook County. Neither area could dominate the entire state, and a reasonable balancing of interests was achieved. In 1960, at the taking of the federal census, Cook County had a population of 5,129,725—50.89 per cent of the Illinois total of 10,081,158. It had, under the 1954 reapportionment amendment, 90 of 177 state representatives and 24 of 58 state senators.

This legislative structure the Court has disapproved, thereby overturning the settlement of a difficult problem of government. Such a decision, we submit, ought not be taken without full hearing including briefs and argument. The apportionment provisions of the Illinois constitution now before this Court are part of the basic charter of government of one of the States of the Union. The issue of their validity under the Constitution of the United States merits full hearing in this Court.

2. In applying the doctrine of *Reynolds* v. *Sims* to Illinois, the Court goes far beyond anything necessary to correct the abuses of apportionment of state legislatures found in Alabama, or in Tennessee (*cf. Baker* v. *Carr*), or in the bulk of the reapportionment cases considered by this Court. It is one thing to open the jurisdiction of the federal courts to consideration of the validity of apportionment of state legislatures under the traditional standards of the Equal Protection Clause. This is sufficient to condemn apportionments having no rational basis or designed to preserve minority control of the legislative process. But it is quite a different thing to read the Fourteenth Amendment as prohibiting a state from choosing as the basis of its governmental structure the very system of checks and balances employed in the Federal Constitution and under which the minority cannot control the majority. This most important aspect of this Court's decision in the reapportionment cases should be separately reconsidered by this Court in its most extreme application to Illinois.

Numerous bills and joint resolutions have already been introduced in Congress to limit the jurisdiction of the federal courts or to amend the Constitution to provide that there be no limitation on the power of the states to apportion their legislatures. Before such extreme counter-measures are considered by Congress, with the resulting threat to the

integrity of this Court as an institution, it is respectfully submitted that this Court should reconsider that part of the doctrine announced in *Reynolds* v. *Sims* which goes far beyond the facts of that case and has its most extreme application in the Court's judgment of reversal in this Illinois case.

3. The controlling facts in this Illinois case—a single county with a majority of the population of the state and a legislature with one house apportioned by population—were not present in any of the reapportionment cases to which the Court gave full hearing. Of the six states from which these cases came, only Colorado had one house of its legislature apportioned by population, and the (1960) population of the most populous county of Colorado was but 28.16 per cent of the total for the state. Consequently, Illinois' legislative structure has been invalidated without full hearing either in this Illinois case or any other case presenting the same issues.

4. Underlying this Court's decision in *Reynolds* v. *Sims* is the proposition that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." (Slip Opinion, p. 33.) In Illinois, there is a factor in any realistic comparison of the weight of a vote in Cook County with the weight of a vote Downstate which the Court did not consider in any of its opinions on state legislative apportionment.

This factor consists of the political strength Cook County voters derive from the common interests, organization, and leadership to which concentration of population has given rise. The weight of an individual vote in the government of a state is negligible; voters influence legislation when

significant numbers have common aims that their representatives can identify and must respond to. This Court expressly recognized the power of Cook County when, in *MacDougall* v. *Green*, 335 U.S. 281, 284 (1948), it distinguished between "thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." Whatever the relevance of the *MacDougall* decision to the political circumstances of other states, cf. *Reynolds* v. *Sims* (Slip Opinion, pp. 26, 29), the "practical opportunities" of Cook County voters "for exerting their political weight at the polls" still exist in Illinois. The continuing applicability of the *MacDougall* case to the state where it arose presents, we submit, an issue worthy of briefing and argument before this Court prior to any decision that overrules *MacDougall sub silentio* and strikes down the fundamental basis of the governmental structure of Illinois.

5. Furthermore, the scope of this Court's decision in the instant case is not clear. Only the apportionment of the Illinois Senate was at issue in the court below, and that court found, without dispute by any party, that "Illinois provides for the election of the members of one house, in this case the lower house, on the basis of population." (220 F. Supp. at 232.) This Court stated in the Maryland case, however, that the "indispensable subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes* (Slip Opinion, p. 16). It then found that the Maryland House of Delegates was not in fact apportioned on a population basis, and that, in any event, "gross disparities" in apportionment of the Maryland Senate voided the state's entire scheme of legislative representation. *Ibid.*

The *per curiam* decision in the instant case gives no indication of what the reversal of the judgment below implies as to the apportionment of the Illinois House of Representatives. It cannot be ascertained whether the Court's judgment overrules the finding below that the method of apportionment of the Illinois House of Representatives is satisfactory or, if it does not, whether the Court found "gross disparities" in Senate apportionment that nonetheless invalidate House apportionment. These are questions, we submit, that deserve consideration and clarification in this Court upon briefs and argument.

CONCLUSION

For the foregoing reasons, rehearing should be granted and this case set down for briefs and oral argument.

Respectfully submitted,

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Certificate of Counsel

I hereby certify, pursuant to Rule 58(1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

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